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SUPREME COURT, U.S.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

NO. 79-6423

ABBY GAIL LASSITER,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

[In the matter of William L. Lassiter]

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Abby Gail Lassiter, petitioner herein, respectfully applies for permission to proceed in forma pauperis in connection with the petition for writ of certiorari to the United States Supreme Court previously filed by petitioner. Petitioner's affidavit in support hereof is annexed hereto.

This the 16th day of April, 1980, Durham, North Carolina.

RESPECTFULLY SUBMITTED:

NORTH CENTRAL LEGAL ASSISTANCE PROGRAM
353 West Main Street
Post Office Box 2101
Durham, North Carolina 27702

(919) 688-6396

By Leowen Evans
Leowen Evans

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v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

[In the matter of William L. Lassiter]

AFFIDAVIT OF ABBY GAIL LASSITER

IN SUPPORT OF

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF NORTH CAROLINA]
] ss
COUNTY OF WAKE]

I, ABBY GAIL LASSITER, being first duly sworn according to law, depose and say in support of my application for leave to proceed without prepayment of costs or fees, as follows:

1. I am the petitioner in the above-entitled case;

2. I am 27 years of age;

3. I am presently unemployed;

4. Because of my poverty I am unable to pay the fees and costs of said cause;

5. Similarly, because of my poverty, I am unable to give security for the same, or pay for the cost of printing any briefs;

6. I am presently incarcerated at the North Carolina Correctional Center for Women, Raleigh, North Carolina, and I am without income;

7. In the proceedings below, the Courts permitted me to proceed in forma pauperis;

8. The nature of the cause is fully described in petitioner's petition for writ of certiorari previously filed with this Court;

9. I believe my case is meritorious and this application is not made for the purpose of delay;

10. My attorney, Leowen Evans of the North Central Legal Assistance Program, is serving without payment of any fees.

Abby Gail Lassiter
ABBY GAIL LASSITER

SUBSCRIBED to and sworn to
before me this 10 day of April, 1980.

Jewel W. Seagroves
NOTARY PUBLIC

My Commission Expires: 2-24-85

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79-6423

NO. MISC.

ABBY GAIL LASSITER,

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v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. MISC.

ABBY GAIL LASSITER,

Petitioner,

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DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

ABBY GAIL LASSITER, petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the North Carolina Court of Appeals, filed November 6, 1979, affirming the judgment of the District Court of the State of North Carolina, Durham County, permanently terminating petitioner's parental rights. In its opinion the North Carolina Court of Appeals specifically held that there is no federal constitutional right to court-appointed counsel for indigent parents in termination of parental rights proceedings. On January 17, 1980, the Supreme Court of North Carolina denied petitioner's application for discretionary review and dismissed her appeal.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 43 N.C.App. 525, 259 S.E.2d 336 (1979), and is annexed to this petition as Appendix "A", infra. No opinion was written by the Supreme Court of North Carolina. The judgment of the Supreme Court of North Carolina denying petitioner's application for discretionary review and dismissing her appeal is annexed as Appendix "B", infra.

JURISDICTION

Petitioner's application for discretionary review was denied by the Supreme Court of North Carolina on January 17, 1980. No application has been made for an enlargement of time to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the due process clause of the Fourteenth Amendment to the United States Constitution requires a state to furnish an indigent parent court-appointed counsel in a proceeding to terminate permanently and irrevocably her parental rights.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1 ***[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

N. C. Gen. Stat. §7A-289.22

The General Assembly declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.
(3) Action which is in the best interest of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.
(4) This Article shall not be used to circumvent the provisions of Chapter 50A, the Uniform Child Custody Jurisdiction Act. (1977, c. 879, s. 8; 1979, c. 110, s. 6.)

N. C. Gen. Stat. §7A-289.32:

The court may terminate the parental rights upon a finding of one or more of the following:

(1) Repealed by Session Laws 1979, c. 669, s. 2.
(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b) or (c) or a neglected child within the meaning of G.S. 7A-278(4).
(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.
(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.
(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:
    a. Established paternity judicially or by affidavit; or
    b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
    c. Legitimated the child by marriage to the mother of the child; or
    d. Provided substantial financial support or consistent care with respect to the child and mother.

N. C. Gen. Stat. §7A-300:

§7A-300. Expenses paid from State funds.--(a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly. The Administrative Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;
(2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;
(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;
(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;
(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;
(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;
(7) Compensation and allowances of court reporters;
(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;
(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the solicitor;
(10) Transcript of the evidence and trial court charge furnished the solicitor when a criminal action is appealed to the appellate division;
(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and
(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

N. C. Gen. Stat. §7A-450:

§7A-450. Indigency; definition; entitlement; determination--(a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter.
(b) Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.
(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

N. C. Gen. Stat. §7A-451:

§7A-451. Scope of entitlement.--(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;
(4) A hearing for revocation of probation;
(5) A hearing in which extradition to another state is sought;
(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentall Ill Criminals) of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes;
(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;
(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
(13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including if applicable:

(1) An in-custody interrogation;
(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required.
(3) A hearing for the reduction of bail, or to fix bail if b ail has been earlier denied;
(4) A preliminary hearing;
(5) Trial and sentencing; and
(6) Review of any judgment or decree pursuant to G.S.7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

STATEMENT OF FACTS AND PROCEEDING BELOW

On April 10, 1978, the Durham County Department of Social Services filed a petition to terminate the parental rights of Abby Gail Lassiter with respect to her three and one-half year old child, William L. Lassiter. The petition also sought to terminate the parental rights of William Boykin, who was alleged to be the natural father of the child. With respect to Abby Gail Lassiter, petitioner herein, the petition alleged that she had not had any contact with the child since December of 1975; that she was serving a sentence for second degree murder in the Women's State Prison, having been tried and sentenced in July of 1976; and that she had willfully left her child in foster care for more than two consecutive years without showing that substantial progress had been made in correcting the conditions leading to the removal, and without demonstrating a positive response to the efforts of the Social Services Department to strengthen her relationship with her child.

While confined in state prison, petitioner was personally served with a summons and a copy of the petition on April 12, 1978, but she failed to file an answer in response to the petition. On August 11, 1978, petitioner was notified by registered mail that a hearing would be conducted on August 31, 1978.

Petitioner was brought to the hearing on August 31, 1978, but was not represented by counsel. The Durham County Department of Social Services was represented by its counsel, Mr. Thomas R. Odom.

Prior to the taking of testimony, the Court discussed with petitioner her failure to secure representation by counsel. Petitioner stated that although she had informed officials at the North Carolina Correctional Center for Women of the pendency of the proceeding, officials at that institution had taken no action to assist her in finding legal counsel. The

Court ascertained that although petitioner was represented by Thomas F. Loflin III with respect to her criminal conviction, she had not consulted with him concerning the proceeding to terminate her parental rights. At the conclusion of its colloquy with petitioner, the court decided to proceed with the hearing without appointing counsel to represent petitioner. (RT. 3-9).[1]

At the hearing the only witness who testified in support of the petition was Bonnie Cramer, a case worker with the Durham County Department of Social Services. Her sole contact with petitioner had been a visit with her at Women's Prison in December of 1977 or Janaury of 1978. During that visit, petitioner requested that William be placed with her mother, Lucille Lassiter. (RT. 10, 15). Most of her testimony concerning petitioner's treatment of her son, William Lassiter, was based upon social welfare records, none of which were authenticated or qualified as business records exceptions to the hearsay rule. (RT. 10-16).

Petitioner attempted to cross-examine Bonnie Cramer, but because of her unfamiliarity with court procedures, she interspersed her questions with testimonial statements. At the urging of counsel for the Department of Social Services, she was admonished by the court on several occasions to cease testifying, and she, ultimately aborted her cross-examination of the witness. (RT. 19, 21, 24).

---

[1] References denoted "RT" are to petitioner's transcript of the hearing conducted August 31, 1978, and transcribed by an official court reporter for the District Court of Durham County on April 14, 1980. On April 15, 1980, pursuant to Rule 21(1) of the Rules of this Court, petitioner requested that the Clerk of the North Carolina Court of Appeals certify the transcript of the hearing conducted August 31, 1978, and provide for its transmission to this Court.

Petitioner testified in her own behalf and denied that she had failed to secure adequate medical care for the child before she was sentenced to prison. (RT. 27). Most of petitioner's testimony was adduced in response to leading questions from the court who treated petitioner as an adverse witness. (RT. 25-36). Petitioner testified that while she was in prison she hoped that her child would be left with her mother who was caring for her other children. (RT. 40). Petitioner's mother, Lucille Lassiter, testified that she was taking care of petitioner's other children and wished to care for "Little Billy" as well because [petitioner] " . . . is the only one [of my children] that have children and that's personally my family and it's all the family we have and I said I want all her children." (RT. 52). No evidence was adduced as to when petitioner might be eligible to be paroled from prison.

At the conclusion of the hearing the court indicated that it would issue an order terminating petitioner's parental rights. Petitioner stated that she wished to appeal the court's decision, and the court informed her that she could obtain an attorney to represent her on appeal from the North Central Legal Assistance Program. (RT. 62).

On September 7, 1978, the court issued its formal order terminating petitioner's parental rights. Included in the court's order were findings:

> "5. That subsequent to being served with a copy of the Summons and Petition, Abby Gail Lassiter communicated and conferred with her attorney regarding post-conviction proceedings, but did not seek counsel regarding this matter.
>
> 6. That Abby Gail Lassiter has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and her failure to do so is without just cause."

Petitioner filed a timely notice of appeal, and on November 6, 1978, the North Carolina Court of Appeals unanimously affirmed the judgment of the District Court. In the Matter of William L. Lassiter, 43 N.C.App. 525, 259 S.E.2d 336 (1979). (App. A). On January 17, 1980, the Supreme Court of North Carolina denied petitioner's application for discretionary review and dismissed her appeal. (App. B).

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE RAISED BY THIS CASE WAS RECENTLY BEFORE THIS COURT IN IN THE MATTER OF OTIS WHERE, HOWEVER, EVENTS SUBSEQUENT TO THE GRANTING OF CERTIORARI PERSUADED THIS COURT NOT TO REACH THE MERITS.

This case presents a constitutional claim which is almost identical to the issue which was recently before this Court in Subler (In the Matter of Otis, et al., No. 79-5215, cert. granted, 48 L.W. 3290 (10/30/79), vacated and remanded, 2/19/80). In the Matter of Otis, supra, involved an indigent parent's right to court-appointed counsel and a free transcript on appeal in a termination of parental rights proceeding. In the present case petitioner, an indigent parent, is alleging that she was denied her constitutionally guaranteed right to be represented by court-appointed counsel at the trial stage of a termination of parental rights proceeding. In In the Matter of Otis, supra, this Court summarily reversed and remanded the order of the Ohio Court of Appeals for reconsideration in light of a later decision by the Ohio Supreme Court holding that an indigent parent does possess a constitutional right to a free transcript and representation by court-appointed counsel on appeal. See State ex rel. Heller v. Owens, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980). This Court should, therefore, grant a writ of certiorari herein in order to resolve the important federal constitutional question which this case presents and which this Court did not have an opportunity to decide on the merits in In the Matter of Otis, supra.

II.

THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONTRARY TO THE OVERWHELMING WEIGHT OF MODERN AUTHORITY.

Another reason why a writ of certiorari should issue is that a division of authority exists as to the issue presented in the present case with an overwhelming majority of the courts, who

have ruled on the issue, supporting the constitutional right of an indigent parent to representation by counsel in a termination of parental rights proceeding. These include termination of parental rights cases where the right to court-appointed counsel has been held applicable both at the trial level[2] and on appeal.[3] In addition, a large number of state and federal courts have also ruled that indigent parents do possess a constitutionally guaranteed right to counsel in neglect or dependency proceedings.[4] Since the principal difference between a neglect or dependency case and a termination of parental rights case is the length and finality of the deprivation of parental custody, with a termination order being final and irrevocable, the above-cited dependency and neglect cases would a fortiori support an indigent parent's constitutional right to representation by counsel in a termination of parental rights proceeding. In fact, the only modern authorities which petitioner has found holding that an indigent parent is not entitled to be represented by counsel in a dependency, neglect, or termination case have been substantially undermined by later decisions. Compare In re Robinson, 8 Cal.App.3d 783, 87 Cal.Rptr. 678 (1970), cert. den. sub nom. Kaufman v. Carter, 402 U.S. 954 (1971), and In re

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[2]Matter of Chad S., 580 P.2d 983 (Okl. S.Ct. 1978); Crist v. Division of Youth and Family Services, 320 A.2d 203 (Super. Ct. of N.J. 1974); Danforth v. State Dept. of Health & Welfare, 303 A.2d 794, 799 (S.Ct. of Me. 1973); In re Friesz, 208 N.W.2d 259 (Neb. S.Ct. 1973); In re Adoption of R.I., 312 A.2d 601 (Pa. S.Ct. 1973); appeal on other grounds, 361 A.2d 294 (1976), cert. den. 429 U.S. 1032 (1977); State v. Jamison, 444 P.2d 15 (Ore. S.Ct. 1968).

[3]Interest of Brehm, 3 Kan.App.2d 325, 594 P.2d 269 (1979); Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55 (Mich. S.Ct. 1976); In re Welfare of Luscier, 84 Wash. 2d 135, 524 P.2d 906 (Wash. S.Ct. 1974); Chambers v. Dist. Court of Dubuque County, 152 N.W.2d 818 (S.Ct. of Iowa 1967) (dictum).

[4]Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); Davis v. Page, 442 F.Supp. 258 (S.D. Fla. 1977); Smith v. Edmiston, 431 F.Supp. 941 (W.D. Tenn. 1977); In re Welfare of Myricks, 85 Wash. 2d 252, 533 P.2d 841 (Wash. S.Ct. 1975); State ex rel. Lemaster v. Oakley, 204 S.E.2d 140 (W.V. S.Ct. of App. 1974); Crist v. Division of Youth and Family Services, 320 A.2d 203 (N.J. Sup. Ct. 1974), mod. on other grounds, 343 A.2d 815 (1975); In re Ella B., 30 N.Y.2d 353, 285 N.E.2d 288 (N.Y. Ct. of App. 1972).

Joseph T., 25 Cal.App.3d 120, 101 Cal.Rptr. 606 (1972), with In re Simeth, 40 Cal.App.3d 982, 115 Cal.Rptr. 617 (1974) [statutory grounds], and Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974); compare also Potvin v. Keller, 313 So.2d 703 (Fla. 1975) with Davis v. Page, 442 F.Supp. 258 (S.D. Fla. 1977).

Further indication of the critical importance of counsel is that numerous model codes, statutes, and rules provide for appointed counsel for indigent parents in dependency, neglect and termination of parental rights proceedings.[5] Finally, the right of indigent parents to appointed counsel at trial in termination of parental rights cases has been established by statute in a large number of jurisdictions, particularly where the applicable codes have been revised in recent years.[6]

It is, therefore, self-evident that the law of North Carolina is at variance with a substantial body of caselaw, statutes, and model codes and rules in refusing to recognize an indigent parent's right to court-appointed counsel in a termina-

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[5] Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, Standard 2.3(b)(IJA-ABA, adopted Feb. 1970); Katz, Freeing Children for Permanent Placement through a Model Act, Section 12(a), 12 Fam.L.Q. 1 (Fall 1978); Lincoln, Model Statute for Termination of Parental Rights, Section 7(2)(NCJFCJ, Nov. 1976); Standard Juvenile Court Act, Sec. 19 (N.C.C.D. 1959); Uniform Juvenile Court Act, Secs. 22(d) and 26(a); Model Rules for Juvenile Courts, Rules 3, 13, and 39 (N.C. C.D., Counsel of Judges, 1969); Legislative Guide for Drafting Family and Juvenile Court Acts, Section 25 (Children's Bureau, H.E.W. 1969); Legislative Guide for the Termination of Parental Rights and Responsibilities and the Adoption of Children, Part II, §8 (H.E.W. Children's Bureau 1968).

[6] See, e.g., Ala. Code §12-15-63; Cal. Civil Code §273.5 (West); Colo. Rev. Stat. §19-11-103(2); D.C. Code Encycl. §16-2304; Ga. Code Ann. §24A-2001; Idaho Code §16-2009; Ind. Code §31-6-7-2(b); Iowa Code Ann. §232.113 (West); Kan. Stat. Ann. §38-820; Ky. Rev. Stat. §199.603; La. Civ. Code Ann. art. 13:1602 (West); Mass. Gen. Laws Ann. ch. 119, §29 (West); Minn. Stat. Ann. §260.155 (West); Mo. Ann. Stat. §211.562 (Vernon); N.H. Rev. Stat. Ann. §170-C:10; N.Y. Fam. Ct. Act §262; N.D. Cent. Code §27-20-26; Ohio Rev. Code Ann. §2151.352; Okla. Stat. Ann. tit. 10, §1109 (West); Or. Rev. Stat. §419.498; S.D. Comp. Laws Ann. §26-9-22.2; Va. Code §49-6-2; Wash. Rev. Code Ann. §13.34.090; W.Va. Code §49-6-2; for a review of all termination statutes as of 1975 see also Katz, Howe, and McGrath, Child Neglect Laws in America, 9 Fam.L.Q. 1, Table X at 47-49 (1975).

tion of parental rights case. It is particularly ironic that, effective January 1, 1980, North Carolina has enacted a statute which would require appointed counsel for indigent parents in abuse, neglect, and dependency cases, but not in termination of parental rights proceedings where the interference with parental rights is total and permanent.[7]

The position of North Carolina not to grant counsel to indigent parents in termination of parental rights cases, as sustained against constitutional challenge by the North Carolina Court of Appeals, is clearly against the weight of modern precedent. Petitioner urges this Court to issue a writ of certiorari in order to resolve this vitally important issue of constitutional law.

III.

AN INDIGENT PARENT IS ENTITLED TO COURT APPOINTED COUNSEL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING.

This Court has required that two steps be met in determining whether a private interest is protected by the procedural due process safeguards of the Fourteenth Amendment. First, the private interest must be shown to be a Fourteenth Amendment liberty or property interest. Smith v. Organization of Foster Families, 431 U.S. 816, 839 (1977). Secondly, where due process must be afforded because an interest is protected by the Fourteenth Amendment, it is necessary to determine "what process is due" in the particular context. Id. at 877.

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[7]In cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency, unless the parent waives that right." N.C. Gen. Stat. §7A-587.

Since there is no provision for appointed counsel in those statutes which pertain to termination proceedings [see N.C. Gen. Stats. §7A-239.30-289.34], and since most of the grounds for terminating parental rights do not include findings as to abuse, neglect, or dependency [see N.C. Gen. Stat. §7A-289.32 (3)(4)(5)(6)], it is apparent that the right to counsel accorded parents by N.C. Gen. Stat. §7A-587 does not extend to termination of parental rights proceedings.

A. The Right To Family Integrity Is Among The Most Fundamental Known to Man.

A parent's right to raise, care for, nourish and educate her children are among the most sacred rights known to man. Stanley v. Illinois, 405 U.S. 645 (1972). In Stanley, Id., this Court cited numerous decisions holding that a parent's right to the care and custody of her children is fundamental to our society and entitled to the highest degree of constitutional solicitude. Id. at 651. Recent decisions by this Court reiterate the same theme. See, e.g., Parham v. J. R., 99 S.Ct. 2493 (1979); Caban v. Mohammed, 99 S.Ct. 1760 (1979); Moore v. City of East Cleveland, Ohio, 431 U.S. 495, (1977); Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

Many of the aforementioned cases have involved a single aspect of parental rights. See, e.g., Parham v. J. R., 99 S.Ct. 2493 (1979) [medical decision]; Wisconsin v. Yoder, 406 U.S. 205 (1972) [education and inculcation of morality]. However, in this case the state power impinges upon the entire fabric of parent-child relations since, under North Carolina law, a decision to terminate parental rights permanently and irrevocably severs the relationship between parent and child. N.C. Gen. Stat. §7A-289.32.[8] For this reason the parental rights implicated herein are not only fundamental in a constitutional sense, but, as one court has found, are "...more precious to many people than the right to life itself." In re Gibson, 483 P.2d 131, 135 (Wash. Ct. of App. 1971).

B. The Right To Court Appointed Counsel Is a "Process That Is Due."

To determine the procedural safeguard due a protectible

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[8] In other jurisdictions a court decision terminating parental rights similarly deprives the parent of her right to ever again regain custody of her children. Wald, State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 633 (1976).

liberty interest, this Court has required a balancing of three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Parham v. J. R., 99 S.Ct. at 2502; Matthews v. Elridge, 424 U.S. 319, 335 (1976).

We believe that this balancing test requires that indigent parents be given the right to court appointed counsel in termination proceedings.

1. The Right To Family Integrity Is The Private Interest That Will Be Affected By An Action To Terminate Parental Rights.

The right to family integrity is the private interest affected by the termination of parental rights. Smith, 431 U.S. at 842; Meyer v. Nebraska, 262 U.S. 390 (1923). As stated previously, this right "...is fundamental to our society and entitled to the highest degree of constitutional solitude." Stanley v. Illinois, supra, at 651. Indeed, the family unit may be the most fundamental social institution of our society. Trimble v. Gordon, 430 U.S. 762, 769 (1977).

2. The Risk Of Erroneous Deprivation Of The Right To Family Integrity Is Inherent Within The Procedure Presently Used - Court Appointed Counsel, As An Additional Procedural Safeguard, Will Eliminate The Risk.

We contend that the risk of erroneous deprivation of the right to family integrity is inherent under a procedural scheme that refuses to appoint counsel to an indigent mother in a proceeding to terminate parental rights. We further contend that the failure to appoint counsel did not only present a risk but actually caused erroneous deprivation in this case.

a. The Risk Of Erroneous Deprivation Is Inherent Within The Present Procedure Used.

According to Parham, supra, "[p]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exception." 99 S.Ct. at 2510. An analysis of (1) the nature of the deprivation, (2) the imbalance of resources, (3) the complexity of the factual and legal issues involved, (4) the frequent intermingling of adversarial and judicial roles and (5) the fact that such a proceeding is functionally analagous to a criminal proceeding establishes that erroneous deprivation of indigent parents' right to family integrity is an inherent risk in a proceeding to terminate parental rights.

The permanent nature of the termination proceeding demands that the procedural mechanism used be especially protective--there is no second chance to correct errors. A study of neglect cases in New York indicates the need for appointed counsel when indigent parents are threatened with the removal of their children from the home by the state:

Disposition	% Represented By Counsel	% Unrepresented By Counsel
Children placed outside the home.	18.2	40.6
Discharged under court supervision.	45.4	39.6
Discharged without court supervision.	9.1	5.0
Petition dismissed after findings.	9.1	3.0
Other	18.2	11.8

4 Columbia Journal of Law 230, 242-2 (1968).

> The conclusions to be drawn from these statistics are aptly drawn by the following commentator:
>
> Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant

> number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel....It would be hard to think of a system of law which works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings. Note: "Child Neglect: Due Process for the Parent", 70 Columb. L. Rev. 465, 476 (1970). Crist v. Division of Youth and Family Services, 128 N. J. Super. 402, 302 A.2d 203, 208 (1974).

This rationale is equally applicable to termination proceedings since neglect proceedings are often the first step to the permanent removal of the children from their homes. Id.; See N.C. Gen. Stat. §7A-289.32(2).

In addition, the inequitable balance of resources, between indigent parents and the state, contributes to the inherently erroneous risk of deprivation in termination proceedings. Due process of law is a concept which cannot become a reality when an indigent parent, who is unrepresented by counsel, must confront the superior power and resources of the state in a complex proceeding brought to terminate permanently her parental rights. The social services department is represented by an attorney who has assembled a case from welfare, probation, and police records, and who has access to expert assistance from medical, psychological and social work professionals. There is, therefore, a gross and inherent imbalance of resources and expertise between the parties [In re Ella B., 30 N.Y.2d 352, 285 N.E.2d 288, 290 (1972] which is exacerbated by the fact that parents who are subjects of these proceedings are frequently ill-equipped to respond in terms of their own intellectual and emotional resources. Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 63-4 (1976); Crist v. Division of Youth, supra. Without the provision of counsel, the parent, unable by poverty and her own unfamiliarity with law to present her case properly, is "...overborne by lawyers and other litigative resources paid for out of the public treasury." Note: The Indigent's Right to Counsel in Civil Cases, 76 Yale L. J. 545, 556 (1967).

Termination of parental rights occurs in the context of a complex legal proceeding in which the guiding hand of counsel is essential if indigent parents are to be furnished a meaningful opportunity to be heard. Presentation of evidence, objecting to evidence, cross-examination of witnesses, finding and utilizing expert testimony, and knowing what evidence is relevant are second-nature to the skilled advocate, but remain beyond the comprehension of most parents in termination proceedings. Davis v. Page, 442 F. Supp. 258, 263 (S.D. Fla. 1977); Danforth v. State Dept. of Health and Welfare, 303 A.2d 794, 799 (Me. S.Ct. 1973); Reist v. Bay County Circuit Judge, 241 N.W.2d 55, 63-64; (Mich. S.Ct. 1976); In re Adoption of R. I., 312 A.2d 601, 602-03 (S.Ct. of Pa. 1973). As one state supreme court has aptly stated in language which is pertinent both to the present case and to the vast majority of termination proceedings:

> "The case at bar was routine for the welfare workers and other juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible." State v. Jamison, 444 P.2d 15, 197 (S.Ct. of Ore. 1968).

Finally, as Justice Black recognized, a neglect or termination of parental rights case is functionally analogous to a criminal proceeding.

> ". . .the State is employing the judicial mechanism it has created to enforce society's will upon an individual and take away her children. The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct--failure to care properly for her children--which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society." Kaufman v. Carter, 402 U.S. 954, 959 (Op. of Black J. diss. from den. of cert.)

The potential for a criminal charge being filed is omnipresent since parental abuse or neglect is, under the laws of every jurisdiction, a basis for criminal prosecution.[10] Therefore, the provision of counsel is essential for the parent to reach an

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[10] For example, N.C. Gen. Stat. §14-318.4 makes child abuse a felony, and N.C. Gen. Stat. §14-316.1 makes it a misdemeanor for a parent to contribute to the neglect of his child.

informed decision as to whether she should testify in the juvenile court proceeding, seek immunity, or attempt to limit her potential for self-incrimination in some other way. See State ex rel. Lemaster v. Oakley, 204 S.E.2d 140, 144 (W. Vir. S.Ct. of App. 1974); Crist v. Division of Youth and Family Services, 320 A.2d 203 (Super. Ct. of N.J. 1974); Danforth v. State Dept. of Health and Welfare, 303 A.2d 794, 799-800 (Me. S.Ct. 1973). The self-incrimination problem is similar to that in Maness v. Myers, 419 U.S. 449, (1975), in which Justice Stewart, in an opinion joined by Justice Blackmun, found that the constitutional right against compulsory self-incrimination encompasses the right to some advice of counsel concerning exercise of the privilege in the first instance. Id. at 471.

Actual Deprivation. Actual termination of parental rights occurred in this case. Many of the difficulties described heretofore, which occur frequently in termination cases when a parent is unrepresented by counsel, are typified in this case. Most of the evidence against petitioner was hearsay based upon social welfare records, but these records were never authenticated or qualified as business records exceptions to the hearsay rule. Petitioner herein was clearly unable to conduct a meaningful cross-examination of Bonnie Cramer, the only witness who testified against her.[11] Since petitioner was unrepresented by counsel,

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[11] In fact, the trial transcript demonstrates that Ms. Lassiter did not understand the function of cross-examination or the difference between testifying herself and examining a witness. For example,

"The Court: All right. Do you want to ask her any questions?
Ms. Lassiter: About what? About what she--
The Court: About this child.
Ms. Lassiter: Oh, yes.
The Court: All right. Go ahead.
[Ms. Lassiter]: The only thing I know is that when you say--
The Court: I don't want you to testify.
Ms. Lassiter: Okay.
The Court: I want to know whether you want to cross-examine her or ask any questions.
Ms. Lassiter: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know--
The Court: I am not talking about what you know. I want to know if you want to ask her any questions or not.
Ms. Lassiter: About that?" (RT. 19).

most of her testimony was delivered in response to questions from the court. The court questioned Ms. Lassiter as though she were an adverse witness and on several occasions, displayed impatience or incredulity at her answers. Most harmful to petitioner was the failure of the court and counsel for the Department of Social Services to elicit information critical to her defense.

The respondent sought termination of petitioner's parental rights on the grounds

> "that [she had] willfully left [her] child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child."

A defense, apparent on the face of the pleadings, is that during the two years in issue (September 1976 to September 1978), petitioner was in prison and, thus, did not willfully leave her son. Furthermore, the additional fact that she asked a member of her extended family to care for her children while she was in jail further negates the allegation that she willfully left her son without making constructive plans for his future.

Petitioner had four other children at the time of the termination proceeding. These four children were placed with petitioner's mother. Petitioner's request that William, the child in issue, also be placed with her mother was denied. Instead, the Durham County Department of Social Services retained the child in foster care, initiated a termination proceeding two years later and terminated her parental rights. This drastic action was taken even though placement with the extended family was the most feasible plan: it would have kept the parent-child relationship intact, it would have allowed the extended family to meet this family crisis, and it would have preserved fiscal resources that were expended for situations where the extended family was not willing to handle the crisis.

A final defense was that the Durham County Department of Social Services had not made diligent efforts to encourage and strengthen the family relationship between petitioner and her child as required by state law. N.C. Gen. Stat. §7A-289.32(3). The refusal to place the child with its extended family is ample support for such a defense. Furthermore, this defense can be supported by a recent survey of North Carolina's foster care institutions:

> "Because of excessively high caseloads, administrative duties, and paperwork, foster care social workers are able to spend only an average of 48 minutes a month on direct, in-person work with each foster child...Once the state has removed the child from his home, it has little contact with the natural parents and [the state] provides few services to help stabilize and reunite the family ..." Governor's Advocacy Council on Children and Youth, Why Can't I Have A Home?: A Report on Foster Care and Adoption in North Carolina, viii (December 1978).

b. The Additional Procedural Safeguard of Court-Appointed Counsel Will Eliminate This Risk.

The preceding argument is premised on the fact that court-appointed counsel in termination proceedings will eliminate the inherent risk of erroneous deprivation of an indigent's right to family integrity.

3. The Government's Parens Patriae And State Police Power Interests Do Not Conflict With Court-Appointed Counsel For Indigent Parents In A Proceeding To Terminate Parental Rights.

We contend that the right to appointed counsel for indigent parents in termination proceedings protects the government's interest, as well as that of the parent. We further contend that even if the government's interest proves to be in conflict with that of the right to appointed counsel, it would not outweigh the need to protect the fundamental interest of the parent.

There are basically two governmental interests involved in the termination of parental rights: parens patriae and the state police power. Stanley v. Illinois, 405 U.S. at 649; Wisconsin v. Yoder, 406 U.S. at 228; Due Process And The Fundamental Right To Family Integrity: A Re-evaluation of South Dakota's Parental Termination Statute, 24 South Dakota Law Review 450 (1979). The state's police power differs from the parens patriae function in that the police power protects society's interest, as well as that of the child. Id.

a. The Government's Parens Patriae Function Is Furthered By Court-Appointed Counsel In A Termination of Parental Rights Proceeding.

Parens Patriae. When the state interferes with a parent's right to family integrity, it generally does so under its parens patriae function as ultimate protector of the child's best interest. Id. North Carolina's parental termination statutes expressly recognize the state's parens patriae duty to "...promote the healthy and orderly physical and emotional well-being of the child." and "...to protect all children from the unnecessary severance of a relationship with biological or legal parents.[12]

A procedure that allows the erroneous termination of parental rights does not further either of these expressed purposes. First, a child's physical or emotional well-being is not promoted when he is erroneously taken away from his family. A recent study has found that "serious emotional problems" exist in thirty percent of the children in North Carolina's foster care system. Why Can't I Have A Home, supra. Another study has found that separation of the child from his parent has caused child neurosis and may lead to dissocial and delinquent behavior later in life. 24 South Dakota Law Review at 454, n. 63. Secondly,

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[12]See N.C. Gen. Stat. §7A-289.22 quoted in full, supra, under "Statutes Involved".

a child is not protected from "unnecessary severence" of his natural parent relationship when his parent's rights are erroneously terminated. Erroneous termination, by definition, is the most serious of all the unnecessary severances of the parent-child relationship.

As stated previously, the appointment of counsel for indigent parents substantially eliminates erroneous termination of parental rights. Such additional procedural safeguard protects parent and child alike: parent, from the erroneous termination of her right to family integrity, and child, from unnecessary severance and emotional trauma. Therefore, the additional procedural safeguard of appointed counsel in termination cases furthers the state's parens patriae function.

b. The Government's State Power Function, Including Fiscal and Administrative Cost, Is Also Furthered By Court-Appointed Counsel In A Termination of Parental Right Proceeding.

In termination proceedings, the state's police power interest is to promote the health, safety and general welfare of its citizens as a whole, while protecting the best interest of the child. 24 South Dakota Law Review at 450. Society's interest includes the fiscal and administrative burden it must bear for such proceedings. Parham v. J. R., supra; Matthews v. Elridge, supra. There are several reasons why the court appointed counsel will not conflict with the state's police power function in such proceedings: (1) North Carolina already has a mechanism to appoint counsel for indigent juvenile deliquents, and for indigent parents in abuse, neglect and dependency actions, (2) this appointment of counsel mechanism may pay for itself in termination cases, and (3) even if it does not, fiscal cost alone does not outweigh the need to protect the fundamental interest involved.

A constitutional mandate to appoint counsel in termination of parental rights cases will not result in substantial "start-up" costs. North Carolina, like most states, already

provides court-appointed counsel to juveniles in delinquency, abuse and neglect cases, and to indigent parents in abuse, neglect or dependent cases.[13]

The appointment of counsel for indigent parents in termination cases may not result in an increased economic burden to the state--the amount saved by the prevention of erroneous placement of children in foster care may pay for the appointment of counsel in such cases. One child erroneously placed in foster care will cost the public approximately thirteen thousand, two hundred dollars ($13,200.00) over a period of four years (the average stay of children placed in foster care in North Carolina). This money saved can be used to pay the expenses for granting indigent parents the right to court-appointed counsel.[14]

Finally, even if we were to assume that there will be some increase in cost, fiscal and administrative cost alone does not outweigh the need to provide procedural safeguards in constitutional adjudications. Matthews v. Elridge, 424 U.S. at 348; Stanley v. Illinois, 405 U.S. at 656. The constitution recognizes higher values than speed and efficiency. Stanley, 405 U.S. at 656.

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[13] "In any proceeding in which delinquency is alleged, the judge shall appoint counsel unless counsel is retained for the juvenile." N.C. Gen. Stat. §7A-584.

"When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile." N.C. Gen. Stat. §7A-586.

"In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to appointed counsel in cases of indigency unless the parent waives the right." N.C. Gen. Stat. §7A-587.

See, fn 5-6, supra, for the list of the jurisdictions that have granted the right to court-appointed counsel in neglect, abuse, dependency and termination proceedings.

[14] A child remains in foster care an average of four (4) years in North Carolina. Why Can't I Have A Home, at vii. Average monthly cost for that child is Two Hundred Seventy-five Dollars ($275.00). Id., at 63. Yearly cost is Three Thousand Three Hundred Dollars ($3,300.00)--[12 x $275.00 = $3,300.00]. Total cost for his stay in foster care is Thirteen Thousand Two Hundred Dollars ($13,200.00)--[4 x $3,300.00 = $13,200.00].

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

This the 15th day of April, 1980.

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No. 79-6423

In the Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

—*v.*—

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO
THE NORTH CAROLINA COURT OF APPEALS

JOINT APPENDIX

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 10, 1978 Juvenile Petition filed in the General Court of Justice, District Court Division, Durham County, North Carolina.

August 31, 1978 Termination of parental rights trial held.

September 7, 1978 Order terminating parental rights entered.

September 18, 1978 Notice of Appeal filed [North Caroiina Court of Appeals]

January 24, 1979 Appeal entries filed.

September 20, 1979 Request for Judicial Notice filed.

September 26, 1979 Oral arguments before the North Carolina Court of Appeals heard.

November 6, 1979 Opinion of the North Carolina Court of Appeals *In the Matter of William L. Lassiter* filed.

December 10, 1979 Notice of Appeal filed.

December 10, 1979 Petition to Supreme Court for Discretionary Review under N. C. Gen. Stat. § 7A-31 filed.

December 27, 1979 Answer to Petition to Supreme Court for Discretionary Review under N. C. Gen. Stat. § 7A-31 filed.

January 17, 1980 Judgment Dismissing Appeal and Denying Petition for Discretionary Review (7914DC80) rendered.

April 16, 1980 Petition for a Writ of Certiorari to the North Carolina Court of Appeals and Application for Leave to Proceed *In Forma Pauperis* filed.

April 16, 1980 Request for Certification and Transmission of Trial Transcript [North Carolina Court of Appeals] filed.

October 6, 1980 The Application for Leave to Proceed *In Forma Pauperis* and the Petition for a Writ of Certiorari to the North Carolina Court of Appeals granted.

THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

File No. 7 J-56

IN THE MATTER OF

WILLIAM L. LASSITER
Born 9-26-74

JUVENILE PETITION—Filed April 10, 1978

Bonnie Cramer, having sufficient knowledge of the matters addressed herein, alleges and says:

1.

That she is a Social Worker with the Department of Social Services of Durham County, and as such is a designated representative for the purpose of bringing this Petition.

2.

That the minor child, William Lassiter, was born in Durham County on September 26, 1974 and is presently residing at a foster home in Durham County.

3.

That the minor child was placed in the legal custody of the Department of Social Services on May 23, 1975, after the Court adjudicated him to be a neglected child in need of protection of the State.

4.

That the minor child was placed in foster care at that time and continues in foster care.

5.

That the mother, Abby Gail Lassiter, is serving a sentence for second degree murder at Women's Prison in Raleigh, having been tried and sentenced in July, 1976.

6.

That the mother has not had any contact with the child since December of 1975. That the mother has without cause, failed to establish or maintain concern or responsibility as to the child's welfare.

7.

That the mother has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child.

8.

That the Petitioner is informed, believes, and alleges on information and belief, that the natural father of this minor child is William Boykin, whose last known address was 511 Burlington Street, Durham, North Carolina.

9.

That this Petitioner is informed, believes, and alleges on information and belief, that the natural mother and father of this minor child were never married to each other.

10.

That the natural father of this minor child has, without cause, failed to establish or maintain concern or responsibility as to the child's welfare.

11.

That the natural father of this child has not, prior to the filing of this Petition; (a) established paternity, judicially or by Affidavit; or (b) legitimated the child pursuant to provisions of G.S. 49-10, or filed a Petition for that purpose; or (c) legitimated the child by marriage to the mother; or (d) provided substantial financial support or consistent care with respect to the child and the mother.

This Petitioner, therefore, prays the Court to enter an Order, terminating the parental rights of Abby Gail Lassiter and William Boykin, natural parents of William L. Lassiter, placing him in the full custody of the Department of Social Services for adoptive placement as provided for by the General Statutes, Chapter 48.

This the 10th day of April, 1978.

/s/ Bonnie Cramer
BONNIE CRAMER

NORTH CAROLINA
DURHAM COUNTY

Bonnie Cramer, Social Worker for the Department of Social Services, being duly sworn, deposes and says: that she is the Petitioner herein, that she has read the foregoing Petition, and that the allegations therein are true of her own knowledge, except as to those things stated upon information and belief, and as to those she believes them to be true.

/s/ Bonnie Cramer

Sworn to and subscribed before me this 10th day of April, 1978.

/s/ Diane C. Wall
Notary Public
My commission expires: 9-30-78

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

File No. 75-J-56

IN THE MATTER OF WILLIAM L. LASSITER
Born 9-26-74

ORDER—September 7, 1978

This matter came on for hearing on the 31st day of August, 1978, before the Honorable S. F. Gantt, Judge Presiding over the Juvenile Division of the District Court of Durham County.

At the call of the matter, the Petitioner was present and represented by Thomas Russell Odom, Staff Attorney for the Department of Social Services. The Respondent, Abby Gail Lassiter, was present, but was not represented by counsel. The Respondent, William Boykin, was neither present nor represented.

Based on the testimony presented and the record before the Court, the Court makes the following findings of fact:

1. That the Respondent, William Boykin was personally served with a Summons and a copy of the Petition on April 11, 1978, but failed to Answer or otherwise respond as required by law.

2. That the Respondent, Abby Gail Lassiter was personally served with a Summons and a copy of the Petition on April 12, 1978, but failed to Answer as required by law.

3. That Abby Gail Lassiter is presently serving a 25 to 40 year sentence imposed upon her conviction in July, 1976 in the Superior Court of Durham County, for second degree murder.

4. That Abby Gail Lassiter was notified of this hearing on August 11, 1978 by Notice of Hearing delivered by registered mail to her in Women's Prison in Raleigh.

5. That subsequent to being served with a copy of the Summons and Petition, Abby Gail Lassiter communicated and conferred with her attorney regarding post-conviction proceedings, but did not seek counsel regarding this matter.

6. That Abby Gail Lassiter has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and her failure to do so is without just cause.

7. That the minor, William Lassiter has been in the legal custody of the Department of Social Services since May 23, 1975, after a determination by this Court that he was neglected as defined by law.

8. That a hearing was held on June 16, 1975, and the Court heard evidence, made findings of fact, and entered an Order continuing the legal custody of the minor in the Department of Social Services.

9. That the child has continued to live in a foster home since that time.

10. That subsequent to May 23, 1975 Abby Gail Lassiter visited the minor child in December, 1975 at the Department of Social Services, and has had no other contact with him except for two occasions when she saw him about town with the foster mother.

11. That Abby Gail Lassiter has not contacted the Department of Social Services about her child since December, 1975, has not expressed any concern for his care and welfare, and has made no efforts to plan for his future.

12. That Abby Gail Lassiter has failed to establish or maintain concern or responsibility as to the child's welfare since on or before May 23, 1975, and that such failure is without just cause.

13. That Abby Gail Lassiter was contacted by the Petitioner at Women's Prison regarding plans for the

minor child to no avail, and she has left the minor child in foster care for more than two consecutive years without showing a positive response to the efforts of the Department of Social Services to strengthen her relationship to the child, or to get her to plan for his future.

14. That the mother, Abby Gail Lassiter, and the putative father, William Boykin, were never married to each other, and the said Abby Gail Lassiter has never been married to anyone else.

15. That the father, William Boykin, has had no contact with the minor since December, 1975, at which time he denied paternity during a visit with the minor in the office of Department of Social Services.

16. That William Boykin has not legitimated the minor, nor has he been determined to be the father in any proceeding brought for that purpose, nor has he provided any financial support or consistent care for the minor.

17. That William Boykin has failed to establish or maintain concern or responsibility for the minor's welfare, and such failure is without just cause.

WHEREFORE, based on the foregoing facts, the Court concludes as a matter of law that Respondents Abby Gail Lassiter and William Boykin have wilfully failed to maintain concern or responsibility for the welfare of the minor.

AND FURTHER CONCLUDES that it is in the best interests of the minor that any and all parental rights now held by the Respondents to this minor be terminated.

NOW THEREFORE, IT IS HEREBY ORDERED that any and all parental rights held by the Respondents, Abby Gail Lassiter and William Boykin in and to the minor William Lassiter be and the same are hereby TERMINATED.

AND IT IS FURTHER ORDERED that the Department of Social Services have the full custody of the minor with the full authority to plan for his welfare, including, but not limited, placement for permanent adoption as his needs and best interests require.

This the 7th day of September, 1978.

/s/ S. F. Gantt
S. F. GANTT
Judge Presiding

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
JUVENILE SECTION

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

File No. 75 J 56

IN THE MATTER OF WILLIAM L. LASSITER

NOTICE OF APPEAL—Filed Sept. 18, 1978

Respondent, Abby Gail Lassiter, by and through her counsel, Benjamin A. Currence and the North Central Legal Assistance Program, hereby gives Notice of Appeal from the Judgment entered in the above captioned matter on the 7th day of September, 1978.

This the 18th day of September, 1978.

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM
Post Office Box 2101
353 West Main Street
Durham, North Carolina 27702
(919) 688-6396

By /s/ Benjamin A. Currence
BENJAMIN A. CURRENCE

NORTH CAROLINA
DURHAM COUNTY

File No. J56

IN THE MATTER OF WILLIAM L. LASSISTER

AFFIDAVIT

The undersigned, being first duly sworn, deposes and says:

1. That he is Thomas F. Loflin III, and at all times material hereto was an attorney licensed to practice law in the State of North Carolina and a member of the Durham County Bar.

2. That the undersigned was retained by the mother of Abigail Lassister to file a post-conviction petition attacking the legality of Abigail Lassister's conviction in the Durham Superior Court for second degree murder.

3. On April 28, 1978, the undersigned counsel filed a Post-Conviction Petition with the Superior Court of Durham County. The gravaman of this Petition was to the effect that Abigail Lassister was deprived of her rights under the Constitutions of the State and Federal Governernment to effective assistance of counsel and due process of law in that until the day of trial the State withheld from Abigail Lassister's trial attorney information to the effect that another person had admitted on the day of the homicide to an investigating police officer that that person had stabbed to death the deceased, and that Abigail Lassister's counsel did not use this information, or move for a mistrial, after this information was learned during the course of Abigail Lassister's trial.

4. Due to no action being taken by the court on the afore-mentioned application for a post-conviction hearing, on October 12, 1978, the undersigned counsel filed a Motion for Appropriate Relief and Evidentiary Hearing, essentially incorporating the allegations of the aforesaid

Petition. To date, no action one way or the other has been taken by the Superior Court of Durham County on the afore-mentioned pleadings.

5. After being retained by Abigail Lassister's mother to represent her, the undersigned counsel did visit Abigail Lassister at Women's Prison to discuss the aspects of the case prior to filing the court pleadings; and undersigned counsel further had correspondence back and forth with Abigail Lassister concerning her case before and after court pleadings were filed. All conversations and all correspondence related solely to the criminal case in which Abigail Lassister had been convicted of second degree murder and to nothing else.

6. Abigail Lassister never mentioned to the undersigned that she had any legal matter involving custody of her son, William L. Lassister, during the time of the attorney-client relationship.

7. Further, had the aforesaid Abigail Lassister mentioned that her son William L. Lassister was the subject of this proceeding, the undersigned would not have been interested in representing Abigail Lassister on such a matter as the instant case; nor would Abigail Lassister have had any funds to pay the undersigned for any such representation. The undersigned inquired into Abigail Lassister's financial status in connection with his representation of her in the criminal matter and found that she was clearly an indigent.

8. The first the undersigned ever heard of the instant matter was on November 16, 1978, when he was advised of the matter involving William L. Lassister by an attorney with the Durham Legal Aid Society and asked to supply this affidavit setting forth the history of his representation of Abigail Lassister.

This the 16th day of November, 1978.

/s/ Thomas F. Loflin
THOMAS F. LOFLIN III
Affiant

Sworn to and subscribed to before me
this 16th day of November, 1978.

/s/ Mary Diane Whittington
Notary Public

My Commission Expires: June 18, 1983

[SEAL]

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
JUVENILE SECTION

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

File No. 75 J 56

IN THE MATTER OF
WILLIAM L. LASSITER

AFFIDAVIT OF INDIGENCY

Your affiant, Abby Gail Lassiter, being first duly sworn, deposes and says:

1. I am the respondent in the above entitled action.
2. I am unable either to give the security required by law because of my poverty or to retain counsel to perfect the above appeal to the North Carolina Court of Appeals.
3. I am advised by my present counsel, Benjamin Currence of the North Central Legal Assistance Program, that there is error in matter of law in the decision of the Durham County District Court in which decision it was determined that my paternal rights be terminated.
4. I desire to appeal that decision to the North Carolina Court of Appeals and request that I be allowed to do so *in forma pauperis.*

/s/ Abby Gail Lassiter
ABBY GAIL LASSITER

Sworn and subscribed to before me this the 21st day of November, 1978.

/s/ Vivian H. Grimes
Notary Public

My Commission Expires: Feb. 23, 1981

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
JUVENILE SECTION

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

File No. 75 J 56

IN THE MATTER OF
WILLIAM L. LASSITER

APPEAL ENTRIES

Respondent has given written notice of appeal in accordance with Rule 3(a)(2) of the Rules of Appellate Procedure. Said written notice was given on the 18th day of September, 1978.

An appeal bond need not be posted in that this appeal is *in forma pauperis* as provided by Rule 6(b) in accordance with the provisions of North Carolina General Statute § 1-288. Respondent is allowed until November 20, 1978 to serve proposed record on appeal and the petitioner is allowed until thirty (30) days thereafter to serve objections or a proposed alternative record on appeal.

This the 29th day of November, 1978.

/s/ Samuel F. Gantt
SAMUEL F. GANTT
Judge Presiding

ASSIGNMENT OF ERROR

Respondent assigns as error the following:

1. The Court's failure to appoint counsel to represent respondent in a proceeding under North Carolina General Statutes § 7A-289.221 *et seq.*, for the termination of parental rights, on the ground that North Carolina law and the Fourteenth Amendment of the United States Constitution guarantee a natural parent who is indigent the right to have counsel appointed to represent him/her in a proceeding under North Carolina General Statute § 7A-289.22 *et seq.* for the termination of parental rights.

EXCEPTION NO. 1 (R. p. 7)

EXCEPTION NO. 1

NARRATIVE OF TESTIMONY

Prior to taking any evidence on the merits the Court questioned respondent with the following results:

The Court noted that respondent was served with a copy of the petition to terminate parental rights and summons on April 12, 1978, and failed to file a Response within the 30 day statutory period. Thereafter the case was scheduled for hearing on the 13th day of June, 1978. Notice of which hearing was served on Respondent on May 25, 1978, by Registered Mail at Women's Prison, Raleigh, North Carolina. The hearing was not held on June 13, 1978, because of a conflict with the Judges' Conference. Respondent's mother appeared for the hearing, however, and was informed that it would be rescheduled. It was rescheduled for August 31, 1978, and the Respondent was served on August 11, 1978, with a notice of hearing by Registered Mail signed for by D. Sales at the North Carolina Correctional Center for Women of the pending legal action. Although Respondent stated to the Court that she had informed officials at the North Carolina Correctional Center for Women, officials at that institution took no action to help respondent receive the assistance of legal counsel.

The Court concluded that, notwithstanding this fact, respondent herself had four months to consult an attorney and in fact had spoken with Thomas F. Loflin III, Esquire, about her criminal conviction (See affidavit of Thomas F. Loflin III, *supra.*) Since respondent had not consulted any attorney specifically with respect to the child, but had ample opportunity to, respondent was not entitled to a delay of the proceedings in order to retain counsel, nor did the Court appoint counsel to assist respondent in opposing the termination of her parental rights as to William L. Lassiter.

STIPULATION OF AGREED RECORD ON APPEAL

It is hereby stipulated and agreed that the foregoing shall constitute the agreed record on appeal to the North Carolina Court of Appeals in IN THE MATTER OF WILLIAM L. LASSITER.

This the 10th day of January, 1979.

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM
Post Office Box 2101
Durham, North Carolina 27702

By /s/ Benjamin A. Currence
BENJAMIN A. CURRENCE
Attorney for
Respondent-Appellant

DEPARTMENT OF SOCIAL SERVICES
of DURHAM COUNTY
Post Office Box 810
Durham, North Carolina 27702

By /s/ Thomas R. Odom
THOMAS R. ODOM
Attorney for Respondent

No. ———

NORTH CAROLINA COURT OF APPEALS

From Durham 75 J 56

IN THE MATTER OF
WILLIAM L. LASSITER

BEFORE GANTT, SAMUEL J., August 31, 1978, Session of Juvenile Division, District Court, Durham County, the General Court of Justice. Judgment was entered on September 8, 1978. Respondent Appealed. (Filed C.A. ————————)

STIPULATION

The Honorable Samuel J. Gantt, Judge Present and Presiding and Thomas R. Odom for petitioner.

The respondent was not represented by counsel.

It is stipulated and agreed by counsel for the petitioner and the respondent on appeal that a SUMMONS was issued on April 10, 1978, in case No. 75 J 56, entitled IN THE MATTER OF WILLIAM L. LASSITER, and that summons was returned showing service on respondent on April 12, 1978. It is further stipulated that respondent was served with notice of hearing on August 11, 1978, and that she was brought from the North Carolina Correctional Center for Women to the hearing at the Durham County Courthouse under custody.

/s/ Thomas R. Odom
THOMAS R. ODOM
Attorney for Petitioner
NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM

By /s/ Benjamin A. Currence
BENJAMIN A. CURRENCE
Attorney for Respondent
on Appeal

No. 7914DC80

NORTH CAROLINA COURT OF APPEALS
FOURTEENTH DISTRICT

From Durham 75 J 56

IN THE MATTER OF
WILLIAM L. LASSITER

REQUEST FOR JUDICIAL NOTICE

TO: THE HONORABLE COURT OF APPEALS
OF NORTH CAROLINA

Pursuant to North Carolina General Statute § 8-1, appellant respectfully requests the Court to take judicial notice of North Carolina General Statute § 7A-546.1 which will become effective January 1, 1980. A certified copy of this statute is attached as Exhibit A.

Respectfully submitted this the 19th day of September, 1979.

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM
Post Office Box 2101
Durham, North Carolina 27702
(919) 688-6396

By /s/ Leowen Evans
LEOWEN EVANS
Attorney for Appellant

[SEAL]

STATE OF NORTH CAROLINA

DEPARTMENT OF THE SECRETARY OF STATE

I, THAD EURE, Secretary of State of the State of North Carolina, do hereby certify the following and hereto attached ONE (1) sheet to be a true copy of Section 7A-546.1 of the General Statutes of North Carolina as it appears in Chapter 815 of the Session Laws of 1979 to become effective January 1, 1980, and was ratified on the 7th day of June, 1979, by *The General Assembly of North Carolina* the original of which is now on file and a matter of record in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal.

DONE IN OFFICE at Raleigh, this the 14th day of September, 1979.

[SEAL]

/s/ Thad Eure
Secretary of State

"§ 7A-546.1. *Parent's right to counsel.*—In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.

No. 7914DC80

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 1979

Durham County 75 J 56

IN THE MATTER OF WILLIAM L. LASSITER

Appeal by respondent from Gantt, Judge. Judgment entered 8 September 1978 in District Court, Durham County. Heard in the Court of Appeals 26 September 1979.

On 26 September 1974, William L. Lassiter, the child who is the subject of this proceeding, was born out-of-wedlock to respondent. On 23 May 1975, the child was adjudicated to be a neglected child in need of protection, and he was placed in the legal custody of the Durham County Department of Social Services. By the offices of that agency, the child was placed in foster care, where he continues at present. The mother of the child, Abby Gail Lassiter (respondent in this matter), is currently serving a sentence for second degree murder at Raleigh Women's Prison, having been convicted and sentenced in July of 1976. She has had no contact with the child since December of 1975. The putative father has offered no support of any type to either mother or child and has taken no action to legitimate the child.

The mother was notified of the hearing in this matter by registered mail and had opportunity to seek counsel in the matter, but did not do so. She took no action to obtain counsel, and appeared at the hearing only because counsel for petitioner caused her to be brought to Durham for the hearing. The trial court heard evidence, found facts, and entered an order terminating her parental rights in the child. From that order respondent appeals, assigning error.

Thomas Russell Odom, for petitioner-appellee.

Benjamin A. Currence, for the respondent-appellant.

MARTIN (Robert M.), Judge.

The sole question presented on appeal is whether the trial court committed reversible error when it did not appoint counsel to represent the indigent respondent in this proceeding to terminate respondent's parental rights in her child. We conclude that the trial court did not commit error.

There is no question but that there is a fundamental right to family integrity protected by the U. S. Constitution. *See* Quilloin v. Walcott, 434 U.S. 246, 54 L.Ed. 2d 511, 98 S.Ct. 549 (1978). At issue is whether due process requires the State to appoint and pay counsel to represent indigents in this situation. The requirements of procedural due process were certainly met in this case. Respondent had ample notice of the hearing, was actually present when it was held, and was allowed to testify and cross-examine petitioner's witnesses. *See* State v. Smith, 265 N.C. 173, 143 S.E. 2d 293 (1965). The requirement of substantive due process imposes a "standard of reasonableness and as such it is a limitation upon the exercise of the police power." In re Moore, 289 N.C. 95, 101, 221 S.E. 2d 307, 311 (1975). It certainly is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse. Certainly no unreasonableness or arbitrariness appears on the instant record where the evidence brought forward by the Department of Social Services demonstrated a pattern of neglect of her child by respondent substantially predating her present incarceration, and no evidence of any rehabilitation of respondent or amelioration of her attitude towards her child was adduced. The termination of parental rights by the State invokes no criminal sanctions against the parent whose rights are so terminated.

While this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated. We agree with the underlying rationale of In re Moore, *supra*, in that the legislature might have required and authorized the appointment and payment of counsel for indigents in these circumstances, but apparently it did not choose to do so. There is certainly no bar to its making such a requirement in the future (as N.C. Gen. Stat. § 7A-546.1, effective 1 January 1980, does under specified circumstances) but we decline to impose any such requirement upon the counties and State in the absence of clear legislative direction. Respondent's assignment of error is overruled. The judgment of the court below is affirmed.

Affiirmed.

Chief Judge MORRIS and Judge PARKER concur.

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

No. 7914DC80 From Durham

IN THE MATTER OF WILLIAM LASSITER

NOTICE OF APPEAL—Filed December 11, 1979

Abby Gail Lassiter, appellant, by and through her counsel, Leowen Evans and the North Central Legal Assistance Program, hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals, filed on November 6, 1979, and certified on November 26, 1979. This judgment directly involves a substantial question arising under Article 14, Section 1, the Due Process Clause of the Constitution of the United States and Article I, Section 19, the Due Process Clause of the North Carolina Constitution, in that the judgment permitted the State to terminate appellant's fundamental, constitutional right to family integrity based on a hearing at which the indigent appellant was not provided with counsel. This constitutional issue was timely raised.

Appellant is indigent and is proceeding *in forma pauperis.*

This the 10th day of December, 1979.

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM
353 West Main Street
Post Office Box 2101
Durham, North Carolina 27702
(919) 688-6396

By /s/ Leowen Evans
LEOWEN EVANS

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE COURT OF APPEALS

No. 7914DC80 From Durham

IN THE MATTER OF WILLIAM LASSITER

PETITION TO SUPREME COURT FOR
DISCRETIONALY REVIEW UNDER
G. S. § 7A-31—Filed December 11, 1979

Abby Gail Lassiter, appellant, by and through her counsel, Leowen Evans and the North Central Legal Assistance Program, hereby petitions the Supreme Court of North Carolina that the Court certify for discretionaly review the judgment of the Court of Appeals, filed on November 6, 1979, and certified on November 26, 1979, on the basis that the subject matter of the appeal has significant public interest and involves legal principles of major significance to the jurisprudence of the State in that it will decide whether an indigent should be granted the procedural safeguard of appointed counsel to protect her right to family integrity in a State action to terminate parental rights.

Appellant is indigent and is proceeding *in forma pauperis*.

This the 10th day of December, 1979.

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM
Post Office Box 2101
353 West Main Street
Durham, North Carolina 27702
(919) 688-6396

By /s/ Leowen Evans
LEOWEN EVANS

GENERAL COURT OF JUSTICE
STATE OF NORTH CAROLINA
IN THE SUPREME COURT

No. 144 PC—Fall Term 1979 From Durham

IN THE MATTER OF
WILLIAM LASSITER

ANSWER TO PETITION TO SUPREME COURT FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

The Petitioner, Durham County Department of Social Services, by and through the undersigned counsel, responds to the Petition to the Supreme Court for Discretionary Review under General Statute 7A-31, filed by the Respondent through her counsel of record and docketed in the Supreme Court on December 11, 1979 as follows:

1. That the Court of Appeal of North Carolina, in a decision rendered on November 6, 1979, found that the minor child had been born on September 26, 1974; that the minor child has been in the legal custody of petitioner since May 23, 1975; that the child's mother, Abby Gail Lassiter, Respondent herein, is presently serving a sentence for second degree murder at Raleigh Women's Prison; that she has had no contact with the child since December of 1975; that the Respondent was given ample notice of the hearing on the Petition to terminate her parental rights; that the Respondent appeared at the hearing on the Petition to terminate her parental rights, offered evidence and cross-examined witnesses;

2. That based on the record before the court as recited above, the Court of Appeals, without dissent, affirmed the District Court's termination of the mother's parental rights to the minor child.

3. That the minor child has lived over four of his five years of life with no contact with the natural mother.

4. That the Legislature has expressed a recognition of a necessity for a child such as the minor child involved herein to have a permanent plan for care at the earliest possible age, (G.S. 7A-289.22(2), and further expressed an intent to defer to the best interest of the child in those cases where the interest of the child and those of the parents conflict (G.S. 7A-289(3).

5. That the public interest in providing a permanent plan of care for this minor child outweighs the interest, now asserted by the parent, which has been considered by the Legislature and found by that body to not require legislative enactment.

WHEREFORE, the Petitioner herein respectfully requests the Court to deny the Petition for Discretionary Review.

This the 21st day of December, 1979.

/s/ Thomas Russell Odom
THOMAS RUSSELL ODOM
Assistant County Attorney
Attorney for the Petitioner
P.O. Box 810, Durham, N.C.
(919) 683-1341

No. 144PC

SUPREME COURT OF NORTH CAROLINA
FOURTEENTH DISTRICT

Fall Term 1979

(7914DC80)

IN THE MATTER OF
WILLIAM LASSITER

JUDGMENT DISMISSING APPEAL AND DENYING PETITION FOR DISCRETIONARY REVIEW—
January 17, 1980

This matter came on to be considered upon Abby Gail Lassiter's notice of appeal from the North Carolina Court of Appeals pursuant to G.S. 7A-30, and petition for discretionary review pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in Conference, this 8th day of January 1980 that the petition for discretionary review be denied, that the appeal be dismissed, and that it be so certified to the North Carolina Court of Appeals.

It is considered and ajudged further that Abby Gail Lassiter do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

/s/ CARLTON, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 17 day of January, 1980.

/s/ John R. Morgan
JOHN R. MORGAN
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Thomas Russell Odom, Attorney of Law
Leowen Evans, Attorney at Law

No. 7914DC80

NORTH CAROLINA COURT OF APPEALS
FOURTEENTH DISTRICT

From Durham 75 J 56

IN THE MATTER OF
WILLIAM L. LASSITER

REQUEST FOR CERTIFICATION AND TRANSMISSION OF TRANSCRIPT—
Filed April 16, 1980

TO: THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA

Pursuant to United States Supreme Court Rule 21 (1), Abby Gail Lassiter (Appellant in the above-captioned matter), respectfully requests the Court to certify the transcript of the hearing conducted August 31, 1978 and provide for its transmission to the United States Supreme Court.

Respectfully submitted this the 15th day of April, 1980.

NORTH CENTRAL LEGAL
ASSISTANCE PROGRAM
(353 West Main Street)
Post Office Box 2101
Durham, North Carolina 27702
919/688-6396

BY: /s/ Leowen Evans
LEOWEN EVANS
Attorney for Appellant

SUPREME COURT OF THE UNITED STATES

No. 79-6423

ABBY GAIL LASSITER, PETITIONER

v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NORTH CAROLINA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 6, 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 332460 127

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

NO. 79-6423

ABBY GAIL LASSITER,
Petitioner

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

APPENDICES TO REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

APPENDIX I

STATEMENT OF THE CASE USING DOCUMENTS IN THE

STIPULATED RECORD ON APPEAL

On the 26th of September, 1974, William L. Lassiter, the child who is the subject of this proceeding, was born. [Juvenile Petition, p. 1]. The natural parents are Petitioner, Abigail Lassiter, and William Boykin, the putative father. [Order, p. 2]. Ms. Lucy Lassiter is petitioner's mother and the child's grandmother. [Affidavit, p. 1].

In May, 1975, the minor child was placed in the legal custody of the Durham County Department of Social Services after the Court "... adjudicated him to be a neglected child in need of protection of the State." [Juvenile Petition, p. 1]. The child has been in Durham County Department of Social Services' legal custody since that adjudication. [Order, p. 2].

In July, 1976, petitioner was convicted and sentenced to 25-40 years in prison for second degree murder. [Order, p. 1]. Petitioner is serving that sentence at the Womens Prison in Raleigh, North Carolina. [Juvenile Petition, p. 1].

On April 10, 1978, Durham County Department of Social Services, through Bonnie Cramer, filed a Juvenile Petition to terminate petitioner's parental rights. [Juvenile Petition]. Under oath, Ms. Cramer alleged that she was the social worker from the Durham County Department of Social Services, that as such she was the

designated representative for the purpose of bringing the Petition, and that the allegations in the Petition were true of her own knowledge, except as to those things stated upon information and belief, and as to those things she believes them to be true. [Juvenile Petition, p. 3]. From her own knowledge she alleged:

> "That the minor child was placed in the legal custody of the Department of Social Services on May 23, 1975, after the Court adjudicated him to be a neglected child in need of protection of the State.
>
> That the minor child was placed in foster care at that time and continues in foster care.
>
> That the mother, Abbygail Lassiter, is serving a sentence for second degree murder at Womens Prison in Raleigh, having been tried and sentenced in July, 1976.
>
> That the mother has not had any contact with the child since December of 1975.
>
> That the mother has without cause, failed to establish or maintain concern or responsibility as to the child's welfare.
>
> That the mother has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child." [Juvenile Petition, pp. 1-2].

Upon information and belief, Ms. Cramer alleged that William Boykin is the putative father, that without cause, he has failed to establish or maintain a concern or responsibility as to the child's welfare, and that he had not established paternity or legitimated the child prior to the filing of the Petition. [Juvenile Petition, p. 2].

On April 12, 1978, petitioner was served with the Juvenile Petition to terminate her parental rights at the Womens Prison in Raleigh. [Stipulation]. On April 28, 1978, Thomas F. Loflin, III, Esquire, filed a Post-Conviction Petition with the Superior Court

of Durham County, contesting the constitutionality of petitioner's imprisonment. Mr. Loflin had been retained by petitioner's mother. [Affidavit, p. 1]. The gravamen of that petition was:

> "...to the effect that Abigail Lassiter was deprived of her rights under the Constitution of the State and Federal Government to effective assistance of counsel and due process of law in that until the day of trial the State withheld from Abigail Lassiter's trial attorney information to the effect that another person had admitted on the day of the homicide to an investigating police officer that that person had stabbed to death the deceased, and that Abigail Lassiter's counsel did not use this information, or move for a mistrial, after this information was learned during the course of Abigail Lassiter's trial." [Id.].

After being retained by Abigail Lassiter's mother, Mr. Loflin visited the petitioner in prison to discuss the aspects of the case prior to filing the court pleadings and had correspondence back and forth with her concerning her case before and after the juvenile court pleadings were filed. [Id.]. Petitioner never mentioned to Mr. Loflin the legal matter involving custody of her son; Mr. Loflin stated that had she mentioned this matter, he would not have been interested in representing her, nor would she have had any funds to pay him for such representation; she was clearly indigent. [Affidavit, p. 2].

On May 12, 1978, petitioner failed to Answer the Juvenile Petition. [Exception to Record on Appeal, Narrative of Facts, p.1].

On May 25, 1978, petitioner was served with a Notice of Hearing to terminate her parental rights, scheduled for June 13, 1978. [Id.].

On June 13, 1978, petitioner's mother, Lucy Lassiter, appeared at the Durham County Courthouse for the scheduled termination of parental rights proceeding. [Id.]. She was informed that the hearing had been cancelled because of a conflict with a Judge's conference. [Id.].

On August 11, 1978, petitioner was served with the second Notice of Hearing to terminate her parental rights, scheduled for August 11, 1978. [Id.]. Petitioner informed the prison guards about the legal proceeding, but they took no steps to assist her in obtaining legal representation. [Id.].

On August 31, 1978, the termination proceeding was held before the Honorable S. F. Gantt, Judge Presiding over the Juvenile Division of the District Court of Durham County. [Order, p. 1]. Bonnie Cramer, social worker from Durham County Department of Social Services, was present; Thomas Russell Odom, staff attorney for Durham County Department of Social Services was present; Petitioner was present but not represented; William Boykin was not present or represented. [Id.].

> "Prior to taking any evidence on the merits the Court questioned [petitioner] with the following results: the Court noted that [petitioner] was served with a copy of the Petition to terminate parental rights and summons on April 12, 1978, and failed to file a Response within the 30 day statutory period. Thereafter the case was scheduled for a hearing on the 13th day of June, 1978, Notice of which was served on [petitioner] on May 25, 1978, by Registered Mail at Womens Prison. The hearing was not held on June 13, 1978, because of the conflict with the Judges' Conference. [Petitioner's] mother appeared for the hearing, however, and was informed that it would be rescheduled. It was rescheduled for August 31, 1978, and the [petitioner] was served on August 11, 1978, with a Notice of Hearing by Registered Mail signed for by D. Sales of the North Carolina Correctional Center for Women of the pending legal action, officials at that institution took no action to help [petitioner] receive the assistance of legal counsel.
>
> The Court concluded that, notwithstanding this fact, Respondent herself had four months to consult an attorney and in fact had spoken with Thomas F. Loflin, III, Esquire, about her criminal conviction (See affidavit of Thomas F. Loflin III, Supra.). Since [petitioner] had not consulted any attorney specifically with respect to the child, but had ample opportunity to, [petitioner] was not entitled to a delay of the proceedings in order to retain counsel, nor did the Court appoint counsel to assist [petitioner] in opposing the termination of her parental rights as to William L. Lassiter. [Exception to Record on Appeal, Narrative of Testimony].

On September 7, 1978, Judge Gantt entered an order terminating parental rights of Petitioner and William Boykin concluding that as a matter of law the natural parents had willfully failed to maintain concern or responsibility for the welfare of the minor child and that it was in the best interest of the minor that all parental rights be terminated. [Order, pp. 1 and 3]. The order states that Judge Gantt based this decision on (1) the testimony presented, and (2) the record before the court. [Id.].

On September 18, 1978, petitioner gave written notice of appeal. [Appeal Entries]. Petitioner's only assignment of error was:

> "The Court's failure to appoint counsel to represent (petitioner) in a proceeding under North Carolina General Statutes §7A-289.22 et seq., for termination of parental rights, on the grounds that North Carolina law and the Fourteenth Amendment of the United States Constitution guarantee a natural parent who is indigent the right to have counsel appointed to represent him/her in a proceeding under North Carolina General Statutes §7A-289.22 et seq. for termination of parental rights." (Assignment of Error).

APPENDIX B OF PETITIONER'S BRIEF IN GIDEON V. WAINWRIGHT

APPENDIX B

In the Present Case, Petitioner Did Not Receive the Benefits and Protection Which Would Have Been Afforded Him By Counsel

The present case discloses the following specific consequences of the denial of counsel:

1. The offense of breaking and entering with intent to commit a misdemeanor raises a number of subtle and complex questions which were not explored at the trial. See *McNair* v. *State*, 61 Fla. 35, 55 So. 401 (1911). The trial judge did not explain the elements of the offense to the jury; he merely paraphrased the charge set out in the information (R. 43; see R. 1).

An individual may be so intoxicated as to negative the intent requisite for a conviction of this offense. *Jenkins* v. *State*, 58 Fla. 62, 66, 50 So. 582, 583 (1909). The principal witness for the state, who stated that he saw Gideon leave the Bay Harbor Poolroom at 5:30 a.m., testified that Gideon "acted kinder drunk" (R. 21). However, the jury was not instructed with respect to the implications of intoxication as a defense.

The accused was not informed of his right to make requests concerning the charge and to be advised of the court's rulings with respect to the requests before final argument.

2. In connection with the *voir dire*, the trial judge advised Gideon that all or any one of the jurors could be excused "if you don't like their looks" (R. 11), but he did not advise Gideon of his right to examine the prospective jurors individually or of his right to object to a juror for cause. See *Carnley* v. *Cochran*, 369 U.S. 506 (1962) (Douglas, J., concurring).

3. The judge improperly cut off cross-examination in several instances. Thus, he did not permit Gideon to inquire into the proprietor's pattern of conduct in locking the building (R. 15), an inquiry which the Florida Supreme Court has held to be proper in a prosecution for this offense. *Adkinson* v. *State*, 48 Fla. 1, 37 So. 522 (1904).

4. No objection was interposed in behalf of the defendant to opinion and hearsay testimony. See e.g., R. 14, A-6; R. 23, A-2.

5. The record shows that after the verdict was returned "Imposition of sentence was withheld pending receipt of an investigative report of defendant's past history." (R. 4.) Three weeks later, the defendant, "having nothing to say," was sentenced to the maximum prison term authorized by the governing statute, a term of five years (R. 5). No plea was apparently made against imposition of the maximum penalty.

APPENDIX III

STATEMENT OF THE CASE IN RESPONDENT'S BRIEF IN GIDEON V. WAINWRIGHT

STATEMENT OF THE CASE

On October 11, 1961, Clarence Earl Gideon, an inmate of the Florida State Prison at Raiford, filed a petition for writ of habeas corpus in the Supreme Court of Florida, alleging substantially as follows:

1. He was arrested on June 3, 1961, and charged with the crime of breaking and entering with intent to commit a misdemeanor, to wit, petit larceny.

2. He plead not guilty and was tried and convicted in the Circuit Court of Bay County, Florida, on August 4, 1961.

3. He was sentenced on August 25, 1961, to a term of five years in the State Prison.

4. At the time of trial he was without funds and without an attorney. He asked the trial court to appoint him an attorney but his request was denied. He told the court that the United States Supreme Court had ruled that the State of Florida should see that everyone who is tried for a felony should have legal counsel, but the court ignored this plea thereby allegedly denying him his rights under the 4th, 5th and 14th Amendments.

5. He sent a petition from the county jail of Bay County to the United States District Court at Tallahassee, Florida, but the Sheriff's office and officials refused to let it go out, contrary to the laws of the United States (R. 45-46).

The Petitioner did not recite any circumstances to show that the trial was unfair or that the charges against him were com-

plex. Nor did Petitioner allege that he was incapable of adequately making his own defense, by reason of any lack of mental capacity, education, experience, etc. On October 30, 1961, the Supreme Court of Florida denied the petition for habeas corpus without requiring a return, without a hearing, and without opinion (R. 47).

Thereafter, on January 8, 1962, Petitioner filed in this Court a petition for writ of certiorari and a motion for leave to proceed *in forma pauperis*. Respondent filed an informal *Response* to the petition.[1] On June 4, 1962, this Court entered an order granting the motion and the petition for certiorari. In addition to other questions presented by this case, counsel were requested to discuss the following in their briefs and oral argument: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?" (R. 47-48).

Petitioner's Designation For Printing, directed that the formal record and the reporter's transcript of trial proceedings in the Circuit Court of Bay County, Florida, be printed and included in the record in this cause.[2] Respondent moved to strike those paragraphs of Petitioner's designations pertaining to the trial proceedings in Bay County,[3] since the trial record and transcript were not before the Florida Supreme Court[4] and are not, there-

---

1. *Response To Petition For Writ Of Certiorari*, filed April 9, 1962.
2. *Petitioner's Designation For Printing*, paragraphs 1 and 2, p. 1.
3. *Respondent's Motion To Strike Paragraphs 1 and 2 Of Petitioner's Designation For Printing*, filed August 31, 1962.
4. Attached to *Respondent's Motion To Strike* is a certificate of the Honorable Coyte P. McCord, Clerk of the Supreme Court of Florida, to the effect that "no pleadings, transcripts, documents or papers," were before that Court, other than the

fore, incorporated in the judgment being reviewed in the present certiorari proceeding.[3] On October 15, 1962, an order was entered denying the motion of Respondent. The trial record and transcript of proceedings have been included in the printed record before this Court (R. 1-44).

---

petition for habeas corpus filed by Petitioner on October 11, 1961, and the order of the Florida Supreme Court denying said petition, filed on October 30, 1961. He also certified that "the trial record and transcript in the case of State v. Gideon in the Circuit Court of Bay County, Florida, August, 1961, have never been and are not now a part of the record which was considered by the Florida Supreme Court in denying Gideon's petition for writ of habeas corpus in October, 1961."

5. We quote, as follows, from *Respondent's Motion To Strike*, *supra* note 3 at p. 3:

"The Florida Court did not have before it the transcript of trial proceedings and formal record in the Circuit Court of Bay County, Florida, which petitioner seeks to include in the printed record in the instant cause, and that Court denied Gideon's petition for habeas corpus on the basis that the bare allegations contained therein were insufficient as a matter of law. The trial papers are not needed by petitioner to prove the allegations of the petition, since respondent has admitted that those allegations must be taken as true. Matters which took place at the trial which were not alleged in the petition for habeas corpus are not involved in the instant case, and therefore have no place in the printed record. For these reasons, inclusion of the trial papers in the printed record herein would be unnecessary and improper."

79-6423

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
DURHAM COUNTY — FILE NO. 75 J 56

IN THE MATTER OF)
WILLIAM L. LASSITER) TRANSCRIPT OF THE EVIDENCE

Before the Honorable S. F. Gantt, Judge Presiding

Respondents:
Abby Gail Lassiter and
William Boykins

Not represented by counsel

Thomas Russell Odom, Esquire
representing Petitioner

Date of Hearing: August 31, 1978

I_N_D_E_X

Petitioner's Evidence	Direct	Cross
Bonnie Cramer	9	19
Respondent's Evidence		
Abby Gail Lassiter	25	36
Lucille Lassiter	43	52

REPORTER'S NOTE:

In this record, Ms. Lassiter is Abby Gail Lassiter; Mrs. Lassiter is Lucille Lassiter.

THE COURT: Let the record show that she was served with copies of the petition according to the records of the Department on the 12th day of April. That she has consulted ar attorney in another matter since that time, but has done nothing toward preparing for this hearing which has been set, how many times, twice? It was set twice?

MR. ODOM: Yes, sir.

THE COURT: And how much notice did she have this time?

MR. ODOM: It was served on her--it was received on August 11 in the--more than 10 days notice. She was served on August 11 by registered mail signed for by D. Sales in the Womens Prison in Raleigh.

THE COURT: All right.

MR. ODOM: So it's actually 20 days notice. She got it on August 11.

THE COURT: And she has had over four months to speak to an attorney and has spoken to an attorney but has not consulted anyone with reference to this child. Isn't that true?

MS. LASSITER: Say what now?

THE COURT: I said you were served with notice of--I mean, you were served with a summons in reference to

the termination of your parental rights of William L. Lassiter on April 12.

MS. LASSITER: Yes, I got the papers.

THE COURT: And you have done nothing towards--

MS. LASSITER: Yes, I did.

THE COURT: What did you do?

MS. LASSITER: I reported to the Department of Corrections Center. I told someone about that. Didn't nobody get in touch with no one and I told them that I had a paper when I got the first paper. I contacted someone and told them I had to go to Court about this paper and didn't nobody contact no one and I told one of the matrons there.

MR. ODOM: Have you talked with Mr. Loflin since you got this paper?

MS. LASSITER: Have I talked with him?

MR. ODOM: Yes, about your parole.

MS. LASSITER: Oh, no, I haven't talked with him since I got this one. No, I haven't talked with him.

THE COURT: You haven't talked with your attorney since when?

MS. LASSITER: I haven't--he said have I talked with him since I got these papers.

THE COURT: When was the last time you talked with him?

MS. LASSITER: It was--How long has it been since I been gone?

MRS. LASSITER: We haven't talked to him period about this child.

THE COURT: I know that. I understand that.

MRS. LASSITER: Oh, well, that was a month or so before he wrote us a letter, told us that--

MS. LASSITER: Oh, yes, that's right.

MRS. LASSITER: --90 more days, 30 to 90 more days that he was going to try to have us a trial, our trial was coming through in court, you know.

MR. ODOM: When was that?

MRS. LASSITER: That was in--let me see, this is August, it could have been June. This was in June.

MS. LASSITER: Was it in June?

MRS. LASSITER: I think it was June.

MS. LASSITER: Was it in April or was it May or what?

MRS. LASSITER: It was in June, I believe. That in 30 to 90 days that he would have us a--that's what we waiting on now so that he could see about getting us our

trial.

MS. LASSITER: It was in May.

THE COURT: To see about getting a new trial.

MRS. LASSITER: Yes.

THE COURT: That was in June?

MS. LASSITER: That was in May.

THE COURT: That was after you were served with these papers?

MRS. LASSITER: Because the time they were going to have one court up here and I came up here and they said all the judges--

MS. LASSITER: April.

MRS. LASSITER: --the judges were not in. And we were suppose to be up here that morning and I checked it and I came and then I got here they said all the judges--and I called up Bonnie Franklin and she told me that all the judges were out on some kind of business meeting or something.

THE COURT: That was in June?

MR. ODOM: You all had a meeting in Asheville, Your Honor, I bel ɜve.

THE COURT: It might have been in Winston-Salem.

MR. ODOM: Well, the Judges' conference was

inadvertently set at that time. Well, if you want to proceed with this, we can or if you want to give her a chance to talk with him about this I don't object. I would like to say this. They have been working with Mr. Loflin and the mother obviously knows something about this. She was here the first time and it seems like some contact could have been made. I don't want to impose on any rights that she may have or might want to have, but they have been working with a lawyer and apparently have had some contact with him since they got this and I can see that she is probably much more concerned in many ways about getting out of prison and that's reasonable, nobody wants to be locked up. But considering the concern that is evidenced this morning, something could have been taken. They know Mr. Loflin and they've had some contact with him.

THE COURT: When was she--When you were arrested, were you given bond or did you stay in jail the whole time?

MS. LASSITER: Me and her both were arrested.

MRS. LASSITER: Yeah, we were out on bond.

THE COURT: And when was that?

MRS. LASSITER: That was June the--'78, no, '76.

MR. ODOM: If Your Honor please, I think they were arrested in February and were tried in June or July.

So, it was some four month period--

THE COURT: Of what year?

MR. ODOM: Of '76.

THE COURT: Well, all of this neglect business and findings of fact by me were made in June of '75.

MRS. LASSITER: Sir, when we were arrested in June was when we went back to trial. This black lady was working on the case, she told--asked her she was ready to bring her child home. And she told my daughter, she said, "You wait until ya'll go to trial and come back after trial and see how the trial come out," and said that if anything happened--

MS. LASSITER: She'd bring the child home.

MRS. LASSITER: She wanted to see if anything was going to happen to both of us and she would see what to do then. And when we went to trial and came back, I don't know, I came back and this black girl got missing, I don't know where she went and I've been running around trying to find out who was--who my case worker was and this lady here came up here and said that--

MR. ODOM: If Your Honor please,--

MRS. LASSITER: --she was the--

MR. ODOM: --we're getting into testimony--

MRS. LASSITER: --she knew what she was going to

do before even talking to me.

MR. ODOM: Our record does not reflect that any of this took place in this fashion. And for the record, I think the majority of what we are concerned about and the reason that we're asking for termination now even though it is a matter of a long period of time, but a lot of this, the ground work for this began before Ms. Lassiter was arrested or sent to prison or anything and a lot of our concerns began to arise then and this pattern of neglect, we would like to show, by the evidence, began before she was removed and put into prison. Of course, she was arrested, tried and convicted and put in prison. That's what our evidence shows and that's what our record reflects and that's the evidence we would like to put on. Do you want to proceed?

THE COURT: I think we can, yes, she has had ample opportunity to seek counseling.

MR. ODOM: We'll call Miss Cramer.

BONNIE CRAMER, being first duly sworn, testified as follows on DIRECT EXAMINATION by MR. ODOM:

Q Your name is Bonnie Cramer?

A Yes.

Q And you are a social worker with the Department of Social Services, isn't that right?

A Yes.

Q And you are the case worker assigned to William L. Lassiter?

A Yes.

Q How long have you been working with the Lassiter child?

A Since August of 1977.

Q Are you familiar with the mother of this minor child?

A I've met her, yes.

Q When did the minor child come into--To clarify this, do you know Abby Gail Lassiter?

A I visited her at Womens Prison on one occasion either in December of '77 or January of '78.

Q And you, of course, know her mother?

A Yes.

Q When did the minor child come into the custody of the Department of Social Services?

A May of 1975.

Q And what was the reason for him coming into custody at that time?

A We received a complaint from Duke Pediatrics that William had not been followed in the pediatric clinic for medical problems and that they were having difficulty in

locating Ms. Lassiter to have William seen in pediatric clinic and asked that a social worker investigate the situation on him.

Q Did the social worker investigate that situation?

A Yes.

Q Does the record document what the social worker did and what the social worker found?

A The record states that there were many attempts to locate Ms. Lassiter to tell her about the appointments and get her to Duke Hospital for William and she could not be found. And in May of '75, a social worker did take William to Duke Hospital and the doctors asked that he stay there because of breathing difficulties, malnutrition and there was a great deal of scarring that indicated that he had a severe infection that had gone untreated.

Q How did the social worker come to take the child to Duke Hospital at that time?

A The social worker went to the home of Ms. Lassiter to get her to take William to the doctor and she was not there. William was there and the social worker took him to the hospital.

Q And that was in May of '75.

A Yes.

Q And the child would not have been a year old until that September, is that right?

A That's correct.

Q He was nine months old, no eight.

A Yes, he was born in September of '74.

Q Ms. Cramer, does the record reflect or do you have any knowledge of how many times Ms. Lassiter has seen the child since he was removed from her home in May of 1975?

A Yes.

Q Would you tell us what that is please, how many times?

A The record reflects that Ms. Lassiter saw William in December of '75 along with Mr. William Boykin on a prearranged visit and that there has been no other contact except Ms. Lassiter mentioned to me that during her trial in July of '76, she, by chance, saw William and his foster mother on the street downtown.

Q Does the record reflect any contact by her with the Department regarding her concern for the child or the care of the child and how the child was growing and progressing?

A Abby Gail Lassiter?

Q Yes.

A No.

Q Do you have any knowledge of her mother?

A Yes.

Q And has her mother made any contact with the Department of Social Services regarding that child?

A There has been a great deal of contact with Mrs. Lassiter concerning the other children who are placed with Mrs. Lassiter. The record does not reflect that there has been any contact concerning William that was initiated by Mrs. Lassiter.

Q Does it reflect any contact initiated by the Department on behalf of the child with her?

A Yes.

Q Do you feel that it would be in the best interest of this child to be placed in the physical custody of his grandmother?

A No.

Q What would be your basis for feeling that it would not be in his best interest?

A I think there are several things. William does not know his grandmother. Mrs. Lassister has a great deal--

MRS. LASSITER: You don't know me.

THE COURT: Don't speak up while she's talking.

A --to do to care for the other children and she does a very fine job of that with a great deal of support from

the Department of Social Services and supportive services. I have--I don't feel that the home is conducive for William. I have checked with people in the community and from Mrs. Lassiter's church who also feel that this additional responsibility would be more than she can handle. Mrs. Lassiter herself has indicated that to me on a number of occasions.

THE COURT: Mrs. Lassiter has what?

A Has indicated that to me--

MRS. LASSITER: No I have not.

A --on a number of occasions

MRS. LASSITER: No I haven't.

THE COURT: Now, listen, I feel that what you're going to do is you're going to end up on the fourth floor of that building over there if you don't keep quiet. Will you please start over again, ma'am? Now, this is the elder Ms. Lassiter?

A Lucille Lassiter, yes.

THE COURT: And what did she say about the child?

A She has indicated to me on a number of occasions that she was not able to take responsibility for the child. She wanted to find another place to live and this has been

something that has been going on for months. She also spends a great deal of time and energy with the children who are at home; there are four children who are with her at this time. The references I consulted in the church and the community are also feeling like it would be too much additional responsibility. And, Your Honor, we are talking about a child who will be four years old this year, this month, who has not seen his grandmother since the chance meeting in July of '76 and that was the only time.

Q All right. Since Ms. Lassiter, Ms. Abby Gail Lassiter has been in Womens Prison in Raleigh, have you had any contact with her about this child?

A I did visit with her in December of '77 to talk with her about William and about our plans for termination of parental rights at that time.

Q Did she indicate any--What was her response to that at that time?

A She was very opposed to it and was hoping that the child could be placed with Ms. Lucille Lassiter, her mother.

Q Has she ever written to you asking about the child, how he was doing or anything like that?

A Abby Gail Lassiter?

Q Yes.

A No.

Q Do you know anything about William Boykin?

A I know that he lives on Burlington Avenue. I have had no contact with him concerning this child.

Q Have you ever tried to contact him?

A Yes, I have sent many letters to him and in December of '75, Mr. Boykin denied to the Department of Social Services that he was the father of the child.

Q Do you know if he and Ms. Lassiter were ever married?

THE COURT: You say he denied that he was the father?

A Yes.

Q Do you know if he has by affidavit or judicial proceeding asserted his paternity to this child?

A To my knowledge he has not.

Q Do you have any knowledge as to whether or not he has ever made any financial support or showed any concern of any sort toward this child?

A He has not.

Q Is this an adoptable child?

A Yes.

MR. ODOM: I have no further questions.

THE COURT: I notice we made extensive findings in June of '75 that you were served with papers and called the social services and told them you weren't coming; and the serious lack of medical treatment. And, as I have said in my findings of the 16th day of June, '75, the Court finds that the grandmother, Ms. Lucille Lassiter, mother of Abby Gail Lassiter, filed a complaint on the 8th day of May, 1975, alleging that the daughter often left the children, Candina, Felicia and William L. with her for days without providing money or food while she was gone. That the AFDC check for the children is mailed to the grandfather's house of Abby Gail Lassiter's boyfriend. Was the child in the grandfather's house of Abby Gail Lassiter's boyfriend?

A In May of 1975? I would have to consult the record. I don't know the address.

THE COURT: All right. I can't imagine it being mailed there unless the child was there.

A The address given is 511 Burlington Street, which is the address of William Boykin and his parents.

THE COURT: And his parents?

A Yes, sir.

THE COURT: This says the AFDC check for the

children--

MR. ODOM: Mr. Boykin was living with his grandfather at the time. He could have been a protective payee, I don't know. Were you living with Mr. Boykin on Burlington Avenue?

MS. LASSITER: No, I was staying with my mother.

MR. ODOM: Why was the AFDC check going to--

MS. LASSITER: Won't none going there.

MR. ODOM: The evidence indicates that it was.

MS. LASSITER: Well, it won't any. That's just something somebody made up. I don't know where that come from.

MR. ODOM: I don't know how she could know what the evidence was, Your Honor, because the findings of fact four and five indicate that she failed to appear either time at the hearings.

A It says in May of '75, it was found by the workers that the address in which Ms. Lassiter was receiving a check 511 Burlington Street, was the address of her boyfriend's parents. On talking with the boyfriend's parents, it was found that Ms. Lassiter did not live there and that her boyfriend picked up her mail for her and took it somewhere else. The boyfriend's parents did not know where Ms.

Lassiter was and did not know of any way to contact her.

MR. ODOM: We at least have a basis for that.

THE COURT: All right. Do you want to ask her any questions?

MS. LASSITER: About what? About what she--

THE COURT: About this child.

MS. LASSITER: Oh, yes.

THE COURT: All right. Go ahead.

CROSS EXAMINATION by MS. LASSITER:

Q The only thing I know is that when you say--

THE COURT: I don't want you to testify.

MS. LASSITER: Okay.

THE COURT: I want to know whether you want to cross-examine her or ask any questions.

MS. LASSITER: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know--

THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.

MS. LASSITER: About that?

THE COURT: Yes. Do you understand the nature of this proceeding?

MS. LASSITER: Yes.

THE COURT: And that is to terminate any rights you have to the child and place it for adoption, if necessary.

MS. LASSITER: Yes, I know.

THE COURT: Are there any questions you want to ask her about what she has testified to?

MS. LASSITER: Yes.

THE COURT: All right. Go ahead.

Q I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.

THE COURT: Who is he?

Q My son, William.

A Ms. Lassiter, your son has been in foster care since May of 1975 and since that time--

Q Yeah, yeah and I didn't know anything about it either.

THE COURT: Just let her answer the question. You ask her the question and let her answer it. She says the child has been in foster care since May of '75. Have you seen the child since then except on the street?

Q Yes, I seen him. Yes, I did see him.

A She saw him in December of '75, on a prearranged

visit with William Boykin. That is the only indication of a visit. And there has been no contact from you regarding William. There has been no contact from anybody else in the family regarding William and to my knowledge, and I see William very often, he has not seen you or your grandmother except that one time when you met him on the street and that time with you in December and he is almost four years now, four years old. He has been in foster care for three of those four years.

Q Well, he knows my mother and he knows me and she had him every since he was a baby.

MR. ODOM: She is testifying, Your Honor.

Q He was a big child anyway because he talked to me anyway.

THE COURT: Don't tell us--we're going to let you swear under oath about these things. All I want you to do is to ask her questions concerning your rights and your child.

Q I think--Well, my rights, I think it's not right--

THE COURT: Don't tell us what you think. Ask her questions if you have any and if you don't, tell her to stand down.

MS. LASSITER: About my child?

THE COURT: Right.

Q Well, what I want to ask about, what I want to know is why you want to take the child and place it in adoption care?

A Because I feel that William needs to have a permanent home, some place where he can grow up and stay and because his family, you nor his grandmother nor anybody else in the family has for over three and a half years shown any interest in him or asked about him and a four year old does not remember a family who does not stay in contact with him or see him. William is four years old and he has got his whole life ahead of him and he needs to be in a home.

Q Well, he's been--I've been--what I'm saying, why you think--I don't think you know what I said. I don't think because he's been--what I'm saying, that child's been with us, he was big while he was took, he was older. He wasn't that very young when they took him. He was kind of big.

A He was eight months old.

Q Yes, he was big, he wasn't that young. And he knows us and he knows my mother. And I feel why you should adopt him, he have a family, we are his family. Why you want to place him in adoption among strange people that not his family and they not got no relationship to him and his

family is over here, my mother and I.

MR. ODOM: I think she has already answered that question. I think it's obvious, you know, I think the answer to that question is very obvious.

THE COURT: What she's driving at is it's apparently going to be a long time before you will be able to associate with this child. The child is in foster care and they want to put the child in a permanent home where he can grow up and live and reside with people that he knows and who will take care of him and treat him as a family member.

MS. LASSITER: We have treated him as a family.

THE COURT: Well, why did she file the complaint?

MS. LASSITER: Well, that is lies.

THE COURT: Huh?

MS. LASSITER: That is lies because when I went to the hospital, when I carried him to the clinic--

THE COURT: Do you want to ask her anything else?

MS. LASSITER: Yes, I want to ask her about this. About you said about the clinic part. You know when you asked--you said about the clinic part.

A Yes.

Q Well, I took that baby to the clinic every day and I

got papers where I took--

THE COURT: Well, wait a minute. We will let you testify under oath about that.

Q And I want to say what they told me at the hospital--

THE COURT: Will you please keep quiet for one minute. We don't want you to testify except under oath. Is there anything else you want to ask her about the child? Now, I don't want you to tell us anything, I just want you to ask questions. Anything else you want to ask her? See, at this time you are not entitled to testify, you have to be sworn. So you can ask her questions but you can't tell us about it until after you're sworn.

Q All right. Oh, yes, when you were saying about--that we didn't get in contact with--about you said we didn't get in contact with you about my son, well I didn't know who the social service was that's why I didn't contact him because they had changed social services and I didn't know who the social service was.

THE COURT: You're telling us about it again. Just ask her any questions you want to. I want to give you a fair try. Anything else you want to ask her?

MS. LASSITER: No, I don't have anything else.

THE COURT: All right, ma'am, you can stand down.

ABBY GAIL LASSITER, being first duly sworn, testified as follows on EXAMINATION by THE COURT:

Q All right. Tell us about your relationship with your son, William L. Lassiter. I understand he was born September 26, 1974?

A Yes.

Q Where was he born, Duke Hospital?

A Yes.

Q All right. Now tell us about your relationship with him and his development and so forth from that time until you were imprisoned.

A When he was born, when I had him and everything?

Q Yes, ma'am.

A Okay. Well, he was born at Duke Hospital on September 26, 1974.

Q Speak up louder, please.

A Okay. He was born September 26, 1974, at Duke Hospital. I brought him home, see, I was staying with my mother. I brought him home and I carried--I'm going to tell you what I did. I carried forth and back to the clinic for his checkups and everything. And I took good care of him 'cause I've always been a good mother. I'm a good mother to my children. And I took care of them and

everything and did what a mother suppose to do for a child. And I love my child. And took him back and forth to the clinic and I had appointments and took him back and forth to Duke Hospital for clinic checkups and everything. So the doctors was in there, so I asked him, the doctor was in there, I don't know, they didn't never say what was wrong with him or nothing like that, you know. They told me--I asked what was wrong with my child. I wanted to know what was wrong with my child. They didn't tell me anything--nothing was wrong with him, they wouldn't tell me anything. They didn't tell me anything. And I wanted to know, you know, what was wrong with William. And I kept taking him and getting his checkup and everything. And I asked the lady, I said, what's wrong with William and they didn't never say anything, tell me anything, what was wrong with him or anything. And the day--

Q So that we will have a time frame here, when were you--

A Sir?

Q As I understand it, before you were tried on the charge of second degree murder, you were out on bond, is that right?

A Yes.

Q And when were you tried and imprisoned?

A You say when was I tried?

Q When were you imprisoned?

A Oh, I came in prison July.

Q Of what year?

A Twenty-third.

Q Of what year?

A Naw, it was 1976.

Q And the child was born in '74?

A He was born in '74.

Q All right. Now there was a hearing before me on the 16th day of June, 1975. The record shows that a petition was filed by Social Services alleging that he was neglected on 9-26-74 and that at that time the child was being held at Duke Hospital because you had not obtained any medical care for the child.

A Yes, I did. I carried him back and forth to the clinic. I got papers. I carried that baby to the clinic.

Q It also says that service of summons with a copy of petition were served on you on the 14th day of May, '75, with notice that it would be heard on the 19th day of May. Why didn't you show up then?

A Say on what? 19th of what?

Q May of 1975. You were told to be here and you

refused to come.

A Here? For the trial?

Q Right.

A Oh, I told you the reason why I got that paper. I got the first paper, what I was telling you, I got it at the prison and I told someone about it that I had to come. That was the first notice that I got, but didn't nobody get in touch with anyone. I told the matron--

Q I'm not talking about that.

A Oh, I thought you were talking about that.

Q I'm talking about--When were you tried and convicted?

A July.

MR. ODOM: I think as a point of clarification, Your Honor, she was in jail at the time--

A I was in jail at the time.

MR. ODOM: --the petition was filed.

THE COURT: Then she got out on bond.

MR. ODOM: That jail occurrence had nothing to do with what she was subsequently tried for.

THE COURT: That was for larceny.

MR. ODOM: That was for something else. At the time the neglect proceeding was filed she was in jail and she was served in jail with the custody order. But when

the matter was continued according to your order she got out of jail and then called and said she wasn't coming to Court.

THE COURT: That's what I'm talking about. On the matter, she was served on the 14th day of May that the matter would be heard on the 19th day of May and she failed to appear and the Court, that was me, on my own motion ordered the Sheriff to go and arrest Abby Gail Lassiter and bring her to court. The court being informed by the Sheriff that she could not be found. I ordered the matter then be calendared the 16th day of June, 1975 at 2:30 p.m. and that custody be left with the Department. A copy of the continuous order borne of this date was mailed on June 9th. That Dr. Jones, and public health were duly informed of the continuance. The matter went on to be called on the 16th day of June and the respondent again failed to appear. You got a letter to appear on the 16th day of June, '75, didn't you?

A From the hospital?

Q No, from down here at the court, to come here for court.

A Oh, no. I got one paper. I ain't got but two. I got

two copies, the last copy that he got on that desk, that's the second paper I got. The first one I got. I'm talking about the first one I got. That was the first one 'cause I don't have but two and they's in my Bible.

Q Your mother is Mrs. Lucille Lassiter, isn't she?

A Yes, sir.

Q Did you know that your mother filed a complaint on the 8th day of May, 1975, alleging that you had often left the children with her for days without providing money and food while you were gone?

A No, 'cause she said she didn't file no complaint.

Q That was some ghost who came up here and filed it I suppose.

A I don't know anything about that, 'cause I had to go off that day. I had done went off that day.

Q Did you ever get any support for the children from social services--

A Yes.

Q --during 1975?

A Uh huh.

Q Where was that mailed to?

A To my mother at her house.

Q At her house?

A Yes. I stayed with my mother. I always have stayed with my mother.

Q Well, did Boykin bring the check over to you?

A No, he didn't. I don't know anything about that. No, he didn't.

Q All right. On the 16th day of June, 1975, when the doctor and nurse came, the record shows that you failed to appear and the Court was informed that "she had within the past hour informed Sam Crawford of the Durham County Department of Social Services that the Court did not have the right to take her child away and that she would not appear in Court." Did you make that call?

A No, I didn't. I didn't make no call like that.

Q Well, how was anybody else going to make that call?

A Because when I--he called me. He picked up and called me.

Q Sam Crawford?

A Yes, and I talked with him and he was telling me about it and I just was telling him that I don't know what happened and I don't know anything about that. I don't know what happened, the only thing, I was shocked when I came home and my baby was gone.

Q All right. But you did talk to him on the 16th day of

June, '75?

A Yes.

Q And then thereafter you called him back, didn't you?

A Did I call him back? No, sir, no, I didn't.

Q Well, he testified that you then thereafter called the Durham County Department of Social Services--

A Unh unh.

Q --and informed Sam Crawford that she might appear if she can get there." Did you make that statement to him?

A No. He asked me, he asked me could I get up there because I didn't know what was happening. And I told him, I said, what is it about, I said, I ain't going--I just said, I'm going to court about my own child? I said what is it about, I'm going to court about my own child and I was just shocked and I just didn't know what was going on. I didn't know what had happened. And by the time then he told me that they were having--having--having the--at that time I didn't have no way to get there anyway and my children were there, I was there with my children and I couldn't leave my children there.

Q I sent the Sheriff around there to get you and you weren't there.

A No, I wasn't there because I had went off, you know, I had went off, you know.

Q No, I don't know anything about it. What do you mean you just "went off"?

A No, I just went up there to the store.

Q And then you called Sam Crawford, didn't you?

A Did I call--

Q Of course, you knew that there was a hearing going on that day concerning the custody of your child, didn't you?

A Did I know it?

Q Yes.

A No, I didn't.

Q Well, you said you talked to Sam Crawford that day.

A Oh yeah, what I mean, he called me, he talked to me on the phone.

Q Then you called him back, didn't you?

A No, I didn't. I didn't never call him back. No, I didn't.

Q But you knew that your child's custody was being determined at that time.

A No, I didn't. No, I didn't, unh unh. I didn't know what was--

Q Well what did he tell you when he called you?

A I didn't know what was going on. He called me and told me--he called and told me. I didn't know what had

happened. Only thing I said, like I said before, he talked to me on the phone and I just told him, I said, got to go to hearing, I said I didn't know anything about it. I don't know what had happened or anything.

Q Well, he told you what had happened, didn't he?

A Not exactly, no, not exactly all what had happened.

Q What did he tell you?

A He just told me they was having--and I asked him, I said,--

Q Just tell me what he told you.

A Yeah. Well I said, well I'm hurt. I said, "you come and got my child." I said, "why you come and get my child." "You took my child." I said, "and I'm hurt" and I said, "I can't bear it and my child is gone."

Q Well, you left the child one time and when you came back all of his hair had been pulled out, hadn't it?

A Naw, unh unh, because that wasn't--that--that--I don't know what had happened where that hair come from pulled out. I don't know where that came about 'bout his hair pulled out because he was shedding, you know, he shed his hair.

Q He shed his hair?

A Yes, he shed his hair, 'cause he was shedding hair.

Q Well, did you tell the doctors out at Duke that in

January '75 there was a bald area on top of the child's head which you said, "a strange man had come into the house while she was gone and took the child and when she returned two hours later his hair had been pulled out." Did you tell them that?

A Strange man? No, I didn't tell them that. I told them something--this was a friend of ours, you know. He come by and played with my baby. And you know, we know him. Us, the family know him.

Q And while you were gone his hair had been pulled out.

A No, I didn't tell them nothing like that. I told them that it was a friend of ours, you know, he come by the house, you know, and he picks up my baby, you know, he's a friend and he's close with our family and everything.

Q Well did you tell them--Well, the child's hair had been pulled out in January of '75.

A And, I told them this friend, you know, he wanted--he wanted--he wanted--he was playing, he wanted to keep him, you know, you know, over there to his house one evening. He wanted to take him over there and keep him, you know, he was going to bring him back--bring him back, he wanted to take him over there to show to his family my baby and everything.

Q Well, let's get off that. What I'm talking about is when you went to see the doctor in '75, January, there was a bald area on top of the child's head, wasn't there?

A I don't know, I didn't see no bald area.

Q Well, you told them that some man had come and pulled his hair out while you were gone, didn't you?

A No, I didn't tell them that, now, that no strange man come in no house.

Q Well, did this friend of yours pull his hair out?

A Naw, he was a friend, he was a friend of the family and we all know him and his family and all of us. We know each other. All us family. He just know all us.

Q Did you tell the doctor that?

A No, I didn't tell him that.

THE COURT: All right, Mr. Odom, see what you can do.

CROSS EXAMINATION BY MR. ODOM:

Q When is the last time you've seen this child?

A That was when I seen him down--let's see. One day I was downtown. I seen him twice since then 'cause one day I seen him downtown before I was having a hearing at my trial. I seen my baby downtown; me and my mother and all of us was together and my boyfriend; all us was together.

And I stopped. And the woman that keeps my child, I know her. She had him and we stopped and I played with him and I talked with him and played with him and everything. Me and my mother and I and my boyfriend. All of us stopped along the road--

Q Before your trial started, when was the last time you saw him?

A Before my trial?

Q Yes.

A Let me see. Then, I seen him then--well, the last time I seen him then that was at a grocery store I seen him then, that time.

Q You've only seen him once at the Social Services building and that's the time that you and William Boykin went up there, wasn't it?

A Let me see. Yes, I seen him at the social services.

Q One time.

A I went to social services up there. And one day--I've been to social services more than one time up there 'cause one day I went up there I had the rest of my children with me. All of my children and all of us, just me and my children.

Q But you didn't see your baby on that day, did you?

A What, I went up there? That day? One day I did go up there and all my children were together and I did see my baby because Mr. Sam had--

Q How many times all together, count up for us, how many times all together you have seen that child since May of 1975.

A I've seen him more than twice.

Q Well, count them up for us.

A I would say about--because I seen him then, me and my children and all of us in--

Q Five, maybe six times?

A Yes. More than that because I have seen him more than that. That's right, more than that.

Q Including when you'd see him on the street.

A Yeah, uh huh.

Q But you haven't made any effort to really visit with him by calling the Department and setting it up, have you?

A Did I make an effort?

Q To call the Department and set up a visit or ask if you could see him?

A Yes, I have, yes, I have. Because she wasn't on the case working then, she wasn't on the case. It was another social worker on the case. She was saying the social worker

was going to bring the child by the house and she was going to bring my baby home. She told me, she was a black lady, she said she was going to bring my baby home.

Q Did you hear this lady testify that the record did not reflect any of that?

A I don't know anything about that, I don't know where she come from, she wasn't the social worker at that time.

Q How long are you going to be in prison?

A I don't know. I'm waiting for to hear from my lawyer soon.

Q What were you convicted of?

A Well, I'm here, I'm here got accused, got a charge, I'm accused of murder, second degree murder and I'm accused of it. And I was framed, or something.

Q Okay. Well, I'm not asking if you are guilty of that.

THE COURT: How much time did the Judge give you?

A Well, twenty-five to forty years.

Q If you could decide right now what you plan to do with that child what would you plan to do for that child right now? What would you have happen to it?

A If I do what now?

Q What would you want to happen to your child if you could plan for him right now, what would happen to him? I

mean, you can't take him over there and keep him with you.
A Well, I'd be a mother for him like I always done, be a mother for him.
THE COURT: Just answer his question. He said what would you like to have done with your child since you can't take him with you?
Q Do you want him to stay where he is?
A No.
Q You want him to go live with your mother?
A Yes, I do. Because that's his family. She is his grandmother.
Q And you think he knows her?
A Yes, he does. He knows all of us, my children.
Q How does he know you? How do you even know that he knows you if you haven't seen him in a year?
A Well, he knows us.
Q Just because you are his family?
A He knows us. Children know they family. I don't care which way it is, children know they family. They know they people, they know they family and that child knows us anywhere. He got brothers and sisters. I got four more other children. Three girls and a boy and they know they little brother when they see him.

Q He hasn't seen any of them in a couple of years.
A Yes, he have, he have seen them since then.
Q How do you know?
A Because I have been with them. They seen him because I had my children with me and when we meet and run into him and see him, they see him too. All of us be standing there. Because the last time when I ran into the store when that lady had him, that lady had him, she had him. And my other children were standing right there and she said there go our other brother and that child got out of that cart, he didn't want to go with that lady. 'Cause she's not his mother, I'm his mother. I don't care which way it is, I'm his mother and that's his grandmother.
Q And he has been in foster care for over three years of his four-year life, isn't that right? He was eight months old when he went into foster care, isn't that right?
A Sir, how would you feel if somebody came and got your child and took it away like that?
Q Just answer my question. He's been in foster care since he was eight months old?
A I don't know how long he has been in there.
MR. ODOM: We're getting unresponsive answers now and it's just antagonizing the situation. I don't have

any other questions for her. I think her testimony speaks for itself. I know what she wants the child to feel and know, but I think it is unreasonable to suspect that he would know her after four years or even three. I don't have any other questions for her, Your Honor.

A You--

THE COURT: Just one minute.

A Okay.

MR. ODOM: If Your Honor please, I would like the record to reflect and ask the Court to take notice of the order filed in this matter on June 16. And would like the record to reflect and the Court to take notice that there is nothing to indicate that any effort was made to overturn that order or take an appeal from it or to dissent from any of the findings of fact made by the Court. I have not checked the Juvenile records but if it is in there I would like the Court to take judicial notice of the fact that the grandmother or at least your court order reflects that the grandmother had filed a petition in essence alleging that the mother, Ms. Abby Gail Lassiter, was neglecting her children prior to the Department of Social Services becoming involved.

THE COURT: Well, we found that the grandmother,

Ms. Lucille Lassiter, mother of Abby Gail Lassiter, filed a complaint on the 8th day of May, 1975, alleging that the daughter often left the children, Candina, Felicia, and William L., for days with her without providing money or food while she was gone. That the AFDC check for the children was mailed to the grandfather's house of Abby Gail Lassiter's boyfriend. And we made the following, upon testimony of the witnesses makes the following findings of fact in the judgment. Upon the testimony of Sam Crawford of the Durham County Department of Social Services that she had called in and said that the Court did not have the right to take her child and she would not appear in Court. A few minutes later she called again and informed Sam Crawford that she might appear if she could get there. I don't think we are getting anywhere, we have the same thing here. All right, you can step down. You want your mother to testify?

A Yes, Uh huh.

THE COURT: All right.

LUCILLE LASSITER, being first duly sworn testified as follows on EXAMINATION by THE COURT:

Q For the record, state your full name and address.

A Where I'm living now?

Q Your full name and address.

A My name is Lucille Lassiter, and it's 219 South Alston Avenue, Alpine Apartments II, Apartment No. C-7. The time when, Abby Gail, that's my daughter, the time when they took her child, I will tell you what happened. She didn't know anything about it because she was not home that day when this Mr. Sam Crawford came there looking for her. 'Cause she had a house of her own but she stayed at my house most all the time with her children. And she was at my house and he came there and he said he had been looking for her and he couldn't find her, where she was staying at. And I had her baby, her little baby in my lap.

Q That's William?

A Yeah, William, we call him Little Billy. She had been taking him, that child had been going to the hospital, I don't know how those nurses could sit up there and say that. That youngun tended to her children, God knows that. She had been taking that child out to the hospital, back and forth. But it was something when the child was born, wasn't nothing wrong with the child but his 'pendix. As far as the hair, the baby was already bald up there. He had pretty good hair back there but it was shedding. And he sit there and talked to me for a while and I told him--he said

where is Abby Gail. I said, I don't know. And I said--and he said--and I said-- and I said that the baby was sick and he asked me how was the baby getting along and I said I don't know, she's taking him back and forth to the doctor, but I said it don't seem like the doctor is doing him any good. So he took the baby and looked at the baby and he said, well, do you want me to take this baby to the hospital today, this baby is ill, he said you said the doctor--I said well, she takes the baby to the doctor, because she have the papers--I have the papers there in my pocketbook now, where she'd taken that baby to the doctor. And her pocketbook hanging up in the closet, she took it and he said well--and I said, do you want me to go with you to the doctor and he said, no, you stay here with the rest of the children, he said, I'm going to the hospital. And so, when he went and he came back and he didn't come back that day and he come back he says your--he come back and he says the baby was sick and they said they were going to keep the baby for two weeks. And my daughter over there, where she was, she was out there--out there had took the children out there to a store out there and this man misplaced and claimed that he thought that she had picked up something but she didn't and she had paid for it.

Q In other words she was--

A And she had done paid for it and they put her in jail. Yeah, and the man thought that she had picked up something but she didn't and they put her in jail but she had a lawyer and she came home.

Q Let's just try to stick--

A And he came back--he came back and he had--and he came back and so I was sitting there and he came up and I said, I told him--I told her, I said, this man, this case-worker come, Abby Gail, and got your child and put it in the hospital and Abby Gail said, what's he doing coming here and getting my baby. She called him baby and I said well I asked him to go with him but he told me that I didn't have to go with him. And she--when they had her up there in jail a paper came there; he sent a paper and had on the paper that he asked me and he didn't ask me no questions. I did not sit down and talk to that man. And he asked me would I come to Court. He had done went and wrote up a paper that this child had been neglected and it's a whole lot of mess. Ane he had a whole lot of mess on the paper that he said I said and God knows that I hadn't said those things. I ain't told that man not anything. Because he just asked me a few questions. He didn't ask me no questions

about this child or nothing. He just said that he had been looking for my daughter. Okay. And so when the time come for the--and I say I'm not--and this is what I said, and I said I'm not going up there to no trial and I told him, I said, I didn't tell you that. And I ain't never seen him no more and I said you know that I did not tell you that. And I said I am not coming to no court for no neglect of no children because that doesn't run through my family.

Q In other words you had notice of the hearing and you said you weren't coming to court?

A I said that I was not going to come to no court--

Q I said in other words you had notice of the hearing but you decided that you were not coming.

A I didn't have no notice of no hearing. He come and wrote me and told me he was going to have a hearing. That's what he told me.

Q And he told you--

A And I--and he--

Q Wait a minute. You told him you were not coming, didn't you?

A I mean that's why we were talking.

Q I said you told him you were not coming.

A Yes, I told him.

Q All right.

A And I said, why you go and put my name in court for. Up there in court and I said I haven't told you anything. That's what I told this Sam Crawford. I said you wouldn't had to told lies--up and told lies on me for.

Q Now when this--

A He took the girl's--

Q Wait a minute. Wait a minute. Now at the hearing that you did not come to, the Court found as a fact that Lucille Lassiter, mother of Abby Gail Lassiter, filed a complaint on the 8th day of May, 1975, alleging that her daughter often left the children, Candina, Felicia and William L.--

A I did not tell him that.

Q --with her for days and did not provide any food or money. Did you file that complaint?

A No, sir, I did not tell him that. I told him--we had talked about--

Q I'm not talking about whether you talked to him about it.

A No, I didn't file it in. No, sir, I didn't tell him that. No, sir, I didn't--

Q Wait a minute. Did you file a complaint?

A How do you mean file it?

Q I mean, did you turn in a written statement saying that?

A Oh, naw, naw, no, sir, no, sir, I did not.

Q Did you go up to Social Services or call in a complaint--

A No, sir, I haven't been to no--

Q --or complained about this??

A No, I didn't. He came to my house. He came there.

Q Did you sign anything while he was there?

A I didn't sign no papers. He came there. Because he was talking about the baby, that's what he was talking about. And talking about he was looking for my daughter.

Q What did you say about her?

A Well, he said he had been looking for my daughter and he couldn't get in touch with her and he wanted to know where she was. And I said she stays over here most all the time. I said, but she got a house but she don't stay in it over there on Carrington--not Carrington Street but up here on--I'll think of the street after a while. But I said she says at my house most all the time, and I said, but she is not here. And then we got to talking about the baby and everything. Because the baby was little and all her

children be little and he asked me was the baby underweight and I told him naw, I said that every one of her children be little and she got five and every one of them be little children when they be born and they turns out to be big. I said all of them be little. And that's the most we talked about and I was telling him about she had to take the baby back and forth to the doctor--

Q Well, how many of her children were staying with you when he came down there?

A All of the children? Well, they all--let me see, she had--

Q Candina?

A Yes, all of them except one because--

Q Where were the other children?

A Where were the other children?

Q There were five, weren't there?

A Naw, it's five now. He was the baby. He was the baby then.

Q Well, he was alive, wasn't he?

A He was alive?

Q And so she had five children, didn't she?

A Naw, she had five after then.

MR. ODOM: She's had two after the baby was born.

THE COURT: After William?

A No, one after William was born. She had one after William was born. And then she moved over on Calvin Street and she was on Calvin Street and this trouble--we were over there and this trouble and then she was going back and forth to the case to the people about her child because she didn't even know where they had put her child. So then they put this little black lady on the case. So she was coming in and she said she would take her, you know, and see about the child. When we would see the child he would knows all us because he was a big child. He knows us, he come right straight to us and all the stuff like that. But anyway, when she got--when this trouble happened, you know, with me and her, with the court on this trouble what she's in now, this black lady and she was talking to her and she said, well, Abby Gail, she said, ya'll go on to court and she said, and we'll see, you know, what's going to happen to ya'll in court and I was found guilty and she would found not guilty in court and come out.

Q Let's not get into all of that.

A I didn't know who was the case worker and then this lady here she came in the picture. Then she came in the picture. And I said, I had been looking all this time

because I had been calling the lady up, you know,--

Q I want to know this. Who had been looking for who?

A I had been waiting on her to find out who was the case worker and then she said, I am the case worker, that's what she said. And then we got to talking about little Billy. She promised me faithfully--she said, now she was going to have me visit little Billy, that she was going to bring little Billy, William, to my house and play with the other little boy, you know, before she would bring him in to live with me because I definitely told her that I could take this child because I have four and I said now, the girl wants me to have the child and I would like for all of them to be together because she is--I got four children, she is the only one that have children and that's personally my family and it's all the family we have and I said I want all her children. And she said you're not--

THE COURT: I tell you what, let's just stop all this. You question her, please. Just answer his questions. We'll be here all day at this rate. I mean, we are just wasting time, we're skipping from one subject to another--

CROSS EXAMINATION BY MR. ODOM:

Q Isn't it a fact, Mrs. Lassiter, that on the date that she said you could visit with the child you showed up and

you had been drinking?

A No. I showed up where?

Q This lady went to your house and you were drinking and you wouldn't let her in the house?

A Lord have mercy. I don't even drink. I'm a Christian.

Q Let me ask you this.

A I don't even drink. Nor smoke either. My paster--

THE COURT: Just answer his questions.

Q Let me ask you this. Did you on or about the 8th day of May, 1975, call a Ms. Mangum at the Department of Social Services and say to her as follows: That your child, Abby Gail Lassiter, leaves the children with you alone at all times. She leaves them for days without providing money or food for the children while she is gone; that her AFDC check is coming to the boyfriend's grandfather house and her boyfriend gets the check. That she beats her mother, that means you, she is beating on you and the boyfriend takes the foodstamps. Did you--

A No, no. Unh unh.

Q --call the Social Services and tell them that?

A No, sir, somebody else could have called and said they was Lucille. Ain't a child I got never will hit me.

That she beat me, naw, unh unh. Not a one of them will ever hit me.

MS. LASSITER: I ain't never hit my mamma.

A Unh unh, no, I didn't do that. That was somebody else 'cause I don't know where that come from. God knows that's not me.

MS. LASSITER: It must be somebody that knew her.

Q You denied it. That's all I want. You don't need to go any further.

A That's right. That's right. That's right. If I'd done it I'd said so.

MS. LASSITER: Lord Jesus, Lord, Lord, Lord. Help them Jesus.

Q And your oldest grandchild, which one is that Candina or Felecia?

A My oldest one?

Q Yes.

A Yes.

Q And she has always stayed with you, isn't that right?

A No, no, no, Angelia.

Q She has always lived with you?

A Yes, uh huh.

Q And her mother has never taken care of her, has she?

A Her mother never did. Her mother was a child, she was fourteen when she had that child, she was a child when she had that child, she was in school.

MS. LASSITER: I was just a child.

A Yeah, she was a child.

Q So you've been raising all of her children, right?

A Be raising all of hers?

Q You've raised all of them except William.

A No, she raised her own children herself. She took care of her own children. Angelia is the onliest one and she was in school and took over and put her back in school just like other people do their children. I put her back in school.

Q Did you tell Ms. Mangum on the 8th day of May, 1975, that when your daughter was in the hospital having William that she left the children in the cold house with no heat?

A No, sir, no, sir, unh unh, no, sir.

MS. LASSITER: That's a lie.

A No, sir, no, sir. God knows, I'll raise my right hand to God and die saying that. Somebody else told that.

THE COURT: I wish you wouldn't talk like that it scares me to be in the same room with you.

A Yes, sir. I'd say somebody else told that. All that

mess--all that mess up there--

Q You deny that you made that report at all.

A I don't deny it because I didn't make it.

Q All right. Let me ask you this. How many times have you seen your grandson, William Lassiter, since he's been in foster care?

A Since he's been in foster care?

Q Yes, ma'am.

A I've saw him three times since he's been there.

Q Just three times in three years, that's once a year.

A I said since he's been in foster care.

Q Three times?

A Because in fact, a whole year went by and I didn't even know where he was. We were trying to get in touch--

Q Did you ask anybody where he was?

A Yes, I called and I didn't know where he was, we had nobody to cooperate with us until this little black lady got on the case. And then she went right along with us and cooperated with us to try to get her child back. That's the onliest anybody that seemed like cared or had any--or cooperated along with us. And this little black lady, I don't know what happened to her, she cooperated with us and went along with us in trying to get her child back.

MR. ODOM: Well, I don't have any other questions, Your Honor.

THE COURT: All right. You can stand down.

MR. ODOM: If Your Honor please, that's all as far as we know unless she has some more witnesses she wants to testify.

THE COURT: Do you have any other witnesses? Ms. Lassiter, do you have any other witnesses?

MRS. LASSITER: That knows about this?

THE COURT: I said that to her, Abby Gail Lassiter. Do you have any more witnesses?

MS. LASSITER: Nobody else don't know nothing about this but me and momma.

THE COURT: Did you ever get a check from the Department of Social Services for the support of these children?

MS. LASSITER: Yes, sir.

THE COURT: Where did it come from? Where did it go to?

MS. LASSITER: Who? My check? I got my check? To my momma's. 'Cause she said I had a household but I stayed at her house mostly, you know.

THE COURT: Did it go to your boyfriend's

grandfather's house?

MS. LASSITER: No, sir. No, sir.

THE COURT: The record shows and there is a finding of fact that it did.

MS. LASSITER: No, it didn't.

MR. ODOM: If Your Honor please, I think the evidence does show that she is talking about how the child knows them. You know children and you know a four year old child is not going to relate to and accept as a parent someone he has not seen but four or five times in the last three years. If he saw them once a week for the last three years, it is not likely that he is going to know them or relate to them as parents. I think the evidence show, at least our evidence shows that there has been a lack of contact and lack of desire other than this morning to object to any planning about the child or cooperate with making any plans. The woman certainly has some ability to communicate with people. She through her mother has been able to communicate with her lawyer about her murder conviction and ask for post-trial proceedings to see if they can get a new trial or something like that. So, it is obvious to me, or it would seem to be obvious that she could make contact with the Department of Social Services

about her child. The record reflects, the Department of Social Services' record reflects that even when she was not in prison, before she was arrested, there was a period from May 1975 until December that she did not see the child, at least to the knowledge of anyone in the Department of Social Services. She was out on the street and apparently had some way of getting around. As I indicated earlier, I would like the Court to take notice of the order and findings of fact that were made and there was no appeal taken from it or no effort to overturn it or no apparent effort on the part of the respondent to come forward to give any evidence. However, if the Court finds anything different from what it did find, Ms. Lucille Lassiter has testified that she knew about the hearing and told the social worker that she won't planning to come. And I think we are talking about a four year old child who, at best, is not going to have any relationship with his mother at anytime in the forseeable future, if in fact she is retried and convicted, or whatever. He doesn't have a relationship with her now. If she doesn't get a new trial she is serving a 25 to 40 year sentence for second degree murder and it's just not likely that any time in the near future of this child he is going to have any meaningful relationship with

his mother. And for the record, I think it is important to note that he has not had any meaningful relationship with his grandmother. And even if he went to live with her and I'm not sure if it would be in his best interest at this point. There has been testimony to the effect that Mrs. Lassiter herself, Mrs. Lucille Lassiter, said that she didn't feel that she was quite capable of taking care of the little fellow at this time. She denied that this morning and the Court can take that for what it's worth. But I do think that we do need to make some plans for this child and that he needs to be free so an adopted family--where he can be put in a family where he has a family, a mother and daddy with him day in and day out. Somebody to assume his care and supervision and let him make some attachments because nobody has made any for him in his first four years of his life.

I think the evidence indicates that there is lack of interest, day-in day-out interest on the part of the mother towards this child and even though it is difficult to have somebody come in and terminate rights of a child and there are all sorts of reasons to object to it, I think this is an appropriate case for it.

THE COURT: Is there anything you want to say

about it? Not you, you are not in the case. I am talking about you.

MS. LASSITER: Yes. I don't think it's right.

THE COURT: Are you saying that you would rather let the child just float around?

MS. LASSITER: No, I want him to be with my mother.

THE COURT: Well, it has already been found as a fact in this matter that she complained that you would leave the children for days without food or support of any kind.

MS. LASSITER: That's not true.

THE COURT: I have already found it as a fact at a hearing when you didn't show up and you were told to be here. And I think that's a certainty due to the fact that you had control and care of the child at that time. Unless you think there is some defect in the record, I am prepared to sign an order terminating her rights.

MR. ODOM: I would like to, of course, there is no testimony to that effect, but there has been some indication that Ms. Lucille Lassiter is disturbed about this. She has been disturbed, apparently, I think that Ms. Smith can evidence some indication that she showed the

first time and we would like for the Court to instruct her that there are appropriate means for her to object to what is happening this morning and to take it out directly against the social worker is an inappropriate way. If you understand what I mean.

THE COURT: All right. You have a right to appeal to the Court of Appeals.

MS. LASSITER: Yes, I do. I want to appeal it.

THE COURT: Well, I said you have a right to appeal it and I would suggest that if you can hire a lawyer, hire one and if you can't go to the legal aid clinic or get your mother to. It's not the legal aid clinic, it's North Central Legal Assistance Program, down at five points on your left as you go towards five points from here.

MR. ODOM: What I'm asking for is for the Court to instruct Ms. Lucille Lassiter not to intimidate the social workers.

THE COURT: No, don't fool with the social workers. This is a court action taking place, not any action on her part.

MRS. LASSITER: Well why do you say--You said to go to the Lawyer's Aid?

THE COURT: I said if you can hire a lawyer, hire

one. If you can't go to North Central Legal Aid Society down at five points and tell them who you are and what the situation is about and if you want to ask their advice you can.

(THE HEARING CONCLUDED.)

CERTIFICATE

I, Lizzie S. Cofer, Court Reporter, do hereby certify that I am official Court Reporter for the District Court of Durham County. That the foregoing 63 pages is a true and accurate transcription of testimony recorded by mechanical device and reduced to typewriting by me, in the case of In the Matter of William L. Lassiter, heard on the 31st day of August, 1978 before the Honorable S. F. Gantt, Judge presiding over the Juvenile Division of the District Court of Durham County. That the aforesaid pages constitute a true and accurate transcription of the tapes to the best of my ability and understanding.

This the 14th day of April, 1980.

Lizzie S. Cofer
Court Reporter

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

ORIGINAL COPY

No. 79-6423

ABBY GAIL LASSITER

PETITIONER,

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

I. THIS CASE, AND THE ISSUE PRESENTED TO THIS COURT, IS CLEARLY DISTINGUISHABLE FROM IN THE MATTER OF OTIS, 48 L.W. 3290 (OCTOBER 30, 1979), WHICH WAS REMANDED TO THE OHIO SUPREME COURT PRIOR TO DECISION BY THIS COURT. . . . . .

II. THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONSISTENT WITH ALL PRIOR DECISIONS OF THIS COURT AS TO THE DUE PROCESS REQUIRED IN MATTERS INVOLVING FAMILY INTEGRITY. 5

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES ONLY NOTICE AND OPPORTUNITY TO BE HEARD, AND NOT APPOINTMENT OF COUNSEL, IN A PURELY CIVIL PROCEEDING TO TERMINATE PARENTAL RIGHTS. 10

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RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Department of Social Services of Durham County, North Carolina, respectfully requests that this Court deny the petition for writ of certiorari, asking review of the North Carolina Court of Appeals' opinion in this case. That opinion is recorded at 43 N. C. App. 525, 259 S. E. 2d 336 (1979).

STATEMENT OF THE CASE

Respondent objects to the Petitioner's Statement of Facts And Proceedings Below, found at pages 7-9 of her Petition because it seeks to introduce into the record on appeal the transcript of the trial of this matter. The Record on Appeal to the North Carolina Court of Appeals submitted by the attorneys for Petitioner and stipulated to by the undersigned counsel for Respondent in January, 1979, omitted any details of the evidentiary hearing. There was no barrier to Petitioner's obtaining a transcript and buttressing her legal arguments to the North Carolina Court of Appeals with recitations from trial proceedings as she now seeks to do. Her failure to do so was a waiver of any objections to the evidence. Respondent was not consulted about preparation of a transcript or its addition to the record to this Court, and was not aware of its existence until seeing the references to it in the Petition for Writ of Certiorari. The Respondent views this as subreption and, therefore, strenuously objects to any reference to the transcript of the hearing in the Petition for Writ of Certiorari.

On April 10, 1978 Respondent filed a Petition seeking the termination of parental rights of Abby Gail Lassiter to the minor, William L. Lassiter in the Juvenile Court of Durham County, North Carolina. This Petition, along with a Summons, was personally served on Ms. Lassiter in Women's Prison, Raleigh, North Carolina on April 12, 1978. She made no response within the time prescribed in the Summons, and as a result of this default, the Petition was set for evidentiary hearing as required by N.C.G.S. §7A-289.28 for June 13, 1978. Ms. Lassiter was served with a Notice of this hearing by registered mail on May 28, 1978. Because this hearing date conflicted with a statewide judicial conference, it was rescheduled for August 31, 1978, notice of which was served on Ms. Lassiter by registered mail on August 11, 1978.

On August 30, 1978, counsel for Respondent requested that the presiding judge call officials at Women's Prison in Raleigh, and direct that Ms. Lassiter be brought to Durham for the hearing. (This information was not originally part of the statement of case on Appeal, but counsel for Respondent was directly questioned about this by Chief Judge Morris of the Court of Appeals during oral argument, and it was specifically referred to in that court's opinion.) Ms. Lassiter appeared at the hearing, cross-examined

witnesses, and testified in her own behalf.

At the beginning of the hearing, the trial judge inquired as to whether or not Ms. Lassiter had legal counsel. This inquiry was initiated by the judge, and Ms. Lassiter did not, at any time, request that he appoint an attorney to represent her. She told the court that she had an attorney to assist her in post-conviction proceedings, that she had been consulting him throughout the pendency of the Petition to terminate her parental rights, and notwithstanding having been served with the Summons, Petition, and two separate Notices of Hearing, had not even mentioned the legal proceeding to him. Considering that these events had spanned four months, the court concluded that Petitioner had had ample opportunity to seek legal counsel, and decided to proceed with the evidentiary hearing.

The evidence adduced at the hearing from the social worker, the Petitioner, and Petitioner's mother substantially proved the allegations in the Petition and the court entered an order terminating the parental rights of Petitioner as being in the best interests of the minor.

Petitioner immediately thereafter contacted the North Central Legal Assistance Program in Durham, and the attorneys in that agency perfected her appeal on the sole question of whether or not the Due Process Clause of the Fourteenth Amendment to the United States Constitution required that the trial judge appoint an attorney to represent her, at state expense, and without legislative authorization, before proceeding with a hearing on the Petition to terminate her parental rights.

The North Carolina Court of Appeals, in considering this sole question, followed the principles of due process previously outlined by this court, and ruled that Ms. Lassiter had been given ample notice and opportunity to be heard and was not entitled to a court appointed attorney at state expense absent leglislative enactment authorizing such. In The Matter Of Lassiter, 43 N.C. App. 525, 259 S.E. 2d 336 (1979). On January 17, 1980, the North Carolina Supreme Court, without opinion, denied her petition for discretionary review In The Matter of Lassiter, 299 N.C. 120, 262 S.E. 2d 6 (1980).

REASONS FOR DENYING THE WRIT

THIS CASE, AND THE ISSUE PRESENTED TO THIS COURT, IS CLEARLY DISTINGUISHABLE FROM IN THE MATTER OF OTIS, 48 L.W. 3290 (OCTOBER 30, 1979), WHICH WAS REMANDED TO THE OHIO SUPREME COURT PRIOR TO DECISION BY THIS COURT.

Initially, Petitioner asserts that this case presents the "almost identical" issue presented to this court in In The Matter of Otis, et al., No. 79-5215, cert. granted, 48 L.W. 3290 (October 30, 1979), vacated and remanded, (February 19, 1980). Respondent submits that there are subtle but substantial differences in the two cases.

In The Matter of Otis challenged the procedure of appeals as of right guaranteed by the state of Ohio, which in its operation, prohibited appeals by indigents in those cases where preparation of an adequate record on appeal required a trial transcript at the indigent appellant's expense. Mrs. Subler, the Petitioner in that case, argued that she could not afford such a transcript and the state court's refusal to require the state to bear the costs of preparing the transcript effectively prohibited her from appealing. She alleged that this was a denial of due process and equal protection guaranteed by the Fourteenth Amendment.

Mrs. Subler had also asked the Ohio Court to appoint counsel at state expense to aid in prosecution of her appeal. She had had the assistance of court-appointed counsel to represent her at trial under the provision of Ohio statute, ORC §2151.352. (See Appendix A). This fact in and of itself put that case in an entirely different posture from this one, but in the same posture as Douglas v. California, 372 U.S. 353 (1963). Due to the lack of authority under Ohio statutes for appointment of counsel for indigents in civil appeals, this request was also denied. She asserted that this denial also violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The questions presented to the Court in In The Matter of Otis, supra, were identical to the issues decided by the Court in Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, supra. The sole distinction is that those two cases involved criminal appeals, and In The Matter of Otis, supra, was a purely civil appeal. Mrs. Subler asked the Court to extend the principles of due process and equal protection outlined in those criminal cases to her civil case on the theory that the family interest is

as fundamental to the individual as the personal liberty interest at stake in criminal proceedings.

In both Griffin v. Illinois, supra, and Douglas v. California, supra, the Court's decisions rested on the fact that the state had already guaranteed criminal appeals but discriminated against the indigent criminal defendants by, in Griffin, effectively preventing appeals where a transcript was required at defendant's expense, and in Douglas, allowing the appeals court to review the indigent defendant's case on the merits before deciding whether counsel should be appointed, while defendants who could retain counsel could more effectively present their cases on appeal initially. But the point to be remembered is that in all three cases, the initial right (appeal) was one guaranteed by acts of the Illinois, California, and Ohio legislatures. The problem was that the mechanisms for exercising that right discriminated against indigents.

In a subsequent decision, the Ohio Supreme Court, relying on Griffin v. Illinois, supra, and Douglas v. California, supra, extended the rights to free transcript and appointed counsel on appeal to the indigent parents in proceedings to terminate parental rights. State ex rel Heller v. Miller, 61 Ohio St. 2d 6 (1980). In light of this ruling, the Writ of Certiorari issued in In The Matter of Otis, supra, was vacated and the case remanded to the Ohio Court.

In the present case, the right asserted (appointment of counsel in a purely civil trial to terminate parental rights) has not been guaranteed by the North Carolina legislature, nor has this Court ever construed the Due Process Clause of the Fourteenth Amendment to require it as a protection of the parent's interest in family integrity.

This case is further distinguishable from In The Matter of Otis, supra, because the Petitioner herein has, with no difficulty and no costs, been able to obtain counsel to perfect her appeal and obtained, at no costs to her, a transcript to assist in the preparation of her appeal to this Court. Petitioner had ample time and opportunity to seek such counsel prior to trial, and had she inquired, the Legal Aid attorneys in Durham would have represented her as ably at trial as they have subsequent to it. Counsel for Respondent has, and continues to, engage in trials of cases where the parent, in the same circumstances as Petitioner, is being represented by

counsel for Petitioner from the North Central Legal Assistance Program in Durham. Thus, counsel was available regardless of a lack of legislative or constitutional mandate to appoint one for her.

Finally, it should be pointed out that the Ohio and North Carolina procedures for termination of parental rights are different. The Ohio procedure in Otis is functionally analogous to North Carolina's procedure for determination of abuse, neglect, or dependency, which, as will be more fully explained hereinafter is different from the procedures for termination of parental rights.

This case is like In The Matter of Otis, supra, only in the fact that both involved a civil trial on the question of termination of parental rights. The issue to the Court in this case is raised by entirely different circumstances, not warranting a grant of a Writ of Certiorari.

II

THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONSISTENT WITH ALL PRIOR DECISIONS OF THIS COURT AS TO THE DUE PROCESS REQUIRED IN MATTERS INVOLVING FAMILY INTEGRITY.

Next Petitioner asserts that the decision of the North Carolina Court of Appeals is "against the weight of modern precedent", (Petition, p. 13) and contrary to "an overwhelming majority of the courts" , (Petition, p. 10). Respondent, in answer to this, points out that the only authority binding on the Court of Appeals at the time this case was decided was that defined by the Supreme Court of North Carolina and this Court. Through the writing of this response, neither has required appointment of counsel for indigents in a purely civil proceeding devoid of criminal characteristics and without some legislative expression that such appointment was desired by the people of the state.

In the case of In Re Robinson, 8 Cal. App.3d 783, 87 Cal. Rptr. 678, cert. den. sub nom. Kaufman v. Carter, 402 U.S. 954 (1971), this court was presented with the similar question of appointment of counsel for an indigent parent in a proceeding to determine custody. This court declined to issue a Writ of Certiorari, thereby upholding the California Court of Appeals, which, through Judge Fleming, stated:

> "Gault does not require that the constitutional safeguards of counsel applicable to criminal cases be met in all civil cases. . ., rather it requires counsel in those cases denominated 'civil' which are basically criminal in nature. We view a proceeding to adjudicate the dependency status of a child as a true civil cause,

> comparable in essentials to a child custody controversy between parents, except that the controversy is . . . one between a parent . . . and the state as parens patriae." Kaufman v. Carter, 87 Cal. Rptr. 675, at 680.

This is the last expression of this Court regarding appointment of counsel in a purely civil action to decide some question of family integrity. However, Respondent recognizes that there are several state and lower federal court rulings that require a right to appointed counsel in proceedings (trial or appeal) related to custody of, and parental rights to children. For the reasons that follow, Respondent denies that these represent an "overwhelming majority."

There are now thirty-nine jurisdictions that provide for appointment of counsel for indigent parents in proceedings related to either custody, parental rights, or both. Of these, thirty-five states have provided for such appointment by legislative enactment.[1] Thus, only four states now require appointment of counsel for indigent parents by judicial mandate only.[2]

The analysis of these various statutes and cases and their actual application is made difficult by the fact that some states, like North Carolina, may treat custody (abuse, neglect and dependency) proceedings somewhat different than they do proceedings to terminate parental rights. North Carolina views them as two different proceedings involving differing rights, parties, and issues, and provides for their adjudication and disposition under two different statutory schemes. Other states, such as Ohio, provide for termination of parental rights as one of the possible alternative custody dispositions resulting from a determination of abuse, neglect, or dependency, in one proceeding, involving the same parties, facts, and issues. (See Appendix A). Petitioner cites as "ironic" this distinction existing in

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[1] Ala. Code §12-15-63; Ariz. Rev. Stat §8-225; Cal. Civ. Code. §237.5; Colo. Rev. Stat §19-1-106(1)(b)(II); D. C. Code §16-2304(b); Ga. Code §24A-2001(a); Haw. Rev. Stat. §802-1; Idaho Code §§16-1606(c) and 16-1608; Ill. Rev. Stat. Ch 37, §701-20(1); Ind. Code §34-1-1-3; Iowa Code §232.28; Kan. Stat. Ann. §38-820; Ky. Rev. Stat. §199.603; La. Civ. Code Ann. Art. 13:1 602; Md. Cts. and Jud. Proc. Code §3-821; Mass. Gen. Laws Ann. Ch. 119, §29; Mich. Juv. Ct. Rule 6.3 (A)(2)(b); Minn. Stat. §260.155(2); Mo. Ann. Stat. §211. 562; Neb. Rev. Stat. §43.205.06; N. H.. Rev. Stat. Ann. §604 A-1; N. M. Stat.Ann. §13-14-25-F; N. Y. Fam. Ct. Act §1043(a); N.C.G.S. §7A-587; N.D. Cent. Code §27-20-26; Ohio Rev. Code § 2151.352; Okla. Stat. Title 10, §1109; Ore. Rev. Stat. §419.498; Pa. Stat. Ann. Title 11, §50-317; S. C. Code §17-3-10; S. D. Compiled Laws Ann. §26-8-22.2; Utah Code Ann. §78-3a-35; Va. Code Ann. §16-1-266C (2); Wash. Rev. Code Ann. §13.34.090; W. Va. Code §49-6-2.

[2] Florida: Davis v. Page. 442 F. Supp 258, (S. D. Fla., 1977); Maine: Danforth v. Maine, 303 A.2d 794, (1973); New Jersey: Crist v. Division of Youth and Family Services, 320 A.2d 203 (1974); Tennessee: Smith v. Edminston, 431 F. Supp. 941, (W. D. Tenn., 1977).

North Carolina, resulting in the appointment of counsel for the indigent parent in custody, but not in termination of parental rights, proceedings (Petition, p. 13). But the difference is based on different needs, interest, legislative purpose, parties, and procedures, not irony.

For instance, under Article 44 of Chapter 7A, General Statutes of North Carolina, (See Appendix B), the Director of Social Services is required to "establish protective services for juveniles alleged to be abused, neglected, or dependent." (G.S. §7A-542). In conjunction with this, all complaints or allegations of abuse, neglect, or dependency are required to be reported to and investigated by the Director of Social Services or his staff. (G.S. §7A-543 and §7A-544). Only the Department of Social Services is authorized to file petitions for the court to hear complaints of abuse, neglect, or dependency. (G.S. §7A-561(b) . His handling of these complaints is reviewable by the state prosecutor serving the judicial district. G.S. §7A-547, and §7A-561(c). Clearly, this is a delegation of the state's parens patriae authority to protect children, and is action brought on behalf of the state initiated by the Director of Social Services for "the protection of the public safety." (G.S. §7A-516). (It was through this type of procedure that Mrs. Subler's rights were terminated by the State of Ohio. See Appendix A, ORC §2151.353) In addition, the parent is subject to criminal sanctions under G.S. §14-318.4 which makes child abuse a felony, and G.S. §14-316.1 which makes child neglect a misdemeanor. The North Carolina legislature, in consideration of these factors, has seen fit to provide indigent parents with appointed counsel in actions involving abuse, neglect, or dependency of their children. (G.S. §7A-587).[3]

On the other hand, the Director of Social Services is not mandated to bring actions to terminate parental rights. He, along with certain other individuals, may initiate such an action. G.S. §7A-289.24, entitled Who May Petition, specifies:

> "A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:
>
> (1) Either parent seeking termination of the right of the other parent; or
>
> (2) Any person who has been judicially appointed as the guardian of the person of the child; or
>
> (3) Any county department of social services or licensed child-placing agency to whom custody of

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[3] It should be pointed out that though this provision became effective January 1, 1980, it is Respondent's contention that this does not invalidate the argument that abuse, neglect, and dependency proceedings are, and should be, treated differently from termination of parental rights actions. The legislature's failure to provide it before did not violate the Fourteenth Amendment.

the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G. S. §48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition."

Clearly, this reflects the intent of the legislature to provide an elective remedy exercisable by individuals standing in loco parentis to the child, acting individually and not on behalf of the state. Even in those specified instances where the Department of Social Services is authorized to initiate a petition to terminate parental rights, it does so in loco parentis on behalf of an individual child, and not on behalf of the state as parens patriae. It is not required to do so at all.

Finally, it should be pointed out that there are no criminal sanctions associated with the termination of parental rights, so to the extent that that, along with the other analogies to state proceedings, is a basis for requiring the appointment of counsel for the indigent parent in abuse, neglect, and dependency proceedings, it would not be required in a termination of parental rights case.

If this Court is going to say that appointment of counsel is required as due process by the Fourteenth Amendment in this case, then any person whose property is foreclosed by the county for his financial inability to pay property taxes will be entitled to the appointment of an attorney in the foreclosure proceeding, otherwise, the Court will have to define interference with the parents' liberty interest in their children by individuals in civil actions as equivalent to the state's interference with an individual's personal freedom by the bringing of a criminal action, and, thus, more important than the property interest guaranteed by the Fourteenth Amendment to the individual property owner.

Though it has consistently reiterated the proposition that there is freedom of choice in family matters protected by the Due Process Clause of the Fourteenth Amendment, (e. g. Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); Boddie v. Connecticut, 401 U.S. 371 (1971); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1973); Smith v. Organization of Foster Families for Equality

and Reform, 431 U.S. 816 (1977), this Court has never specifically ruled that it is so "fundamental" a right as to require appointment of counsel as a guarantee of due process. Every case cited in which familial matters are deemed worthy of constitutional protection has reiterated the principles that due process requires, procedurally, notice and opportunity to be heard, and substantively, that state statutes bear a reasonable, rational relationship to the ends sought, or "powerful countervailing interest . . ." to that of the parents. Stanley v. Illinois, supra, at 651. Petitioner does not challenge the statutory scheme on substantive due process grounds. Clearly the record reflects that procedurally, Petitioner had notice, was present, was heard, and cross-examined witnesses. Her claim to this Court is of a right neither explicitly or implicitly found in the Constitution, nor provided by this Court or any legislature having control over her relationship to her child.

In those states that provide for the appointment of counsel to indigent parents in termination of parental rights actions, Respondent asserts that this is an exercise of legislative prerogative based on the needs and desires of the citizens of the respective states and the statutory schemes designed to meet those needs and desires. In those states where such appointment has been judicially mandated as a due process requirement of the Fourteenth Amendment based on a conclusion that there is a fundamental right to family integrity, the decisions of this Court regarding due process in family matters have been extended too far. But this is the authority of the state judiciary in defining the law based on the needs and desires of their citizens, and the statutory schemes designed to meet those needs and desires.

In North Carolina, the legislature has decided that the needs and desires of its citizens and the statutory scheme provided for the handling of questions of abuse, neglect and dependency of children require appointment of counsel for the indigent parent in those proceedings, though not required by the Fourteenth Amendment. It has viewed the needs and desires of its citizens and the statutory scheme providing for termination of parental rights as sufficiently different so as not to require such appointment. This is the legislature's prerogative. As was recognized by this Court "[A]bsolute equality is not required; lines can be and are drawn and we often sustain them." Douglas v. California, 372 U.S. 355 at 357 (1963).

The North Carolina Court of Appeals, in considering Petitioner's claim there, correctly applied the principles of due process laid down by this Court. Petitioner cites other state decisions and statutes to point out how North Carolina is at variance with them on this issue. But this Court, in Williamson vs. Lee Optical of Oklahoma, 348 U.S. 461 (1955), per Justice Douglas stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident, or out of harmony with a particular school of thought." Further, Justice Douglas quoted from Munn v. State of Illinois, 94 U.S. 113 the principle that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts." id, at 464-465.

III

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES ONLY NOTICE AND OPPORTUNITY TO BE HEARD, AND NOT APPOINTMENT OF COUNSEL, IN A PURELY CIVIL PROCEEDING TO TERMINATE PARENTAL RIGHTS.

With respect to Petitioner's assertion that the Due Process Clause of the Fourteenth Amendment entitled her to appointed counsel in this proceeding to terminate her parental rights, Respondent points out again that the Constitution does not specifically require such, and reiterates the argument that this Court has never construed it to imply such. Respondent concedes that Petitioner had an interest in her child, and that she was entitled to the due process requirements of notice and opportunity to be heard prior to termination of that interest. She does not deny that she was afforded this due process.

Throughout, and particularly in this portion of the Petition, Petitioner consistently confuses the custody of children decided in abuse, neglect, and dependency actions brought by the Department of Social Services as parens patriae pursuant to the state mandate, G.S. §7A-561(b), and the termination of parental rights as an in loco parentis procedure on behalf of the individual child pursuant to Article 24B of Chapter 7A of the General Statutes. As pointed out above, the rights, interests, and procedures of the two are sufficiently different to justify appointment of counsel in the former, and not in the latter.

By applying the balancing test prescribed by this Court in Parham v. J. R. 442 U.S. 584,99 S.Ct. 2493 (1979), Petitioner argues that appointment of counsel is the logical result. True, she had a private interest to her child,

but it was terminated, not by the state acting in parens patriae, but by action of the county Department Of Social Services standing in loco parentis as being in the best interests of the child. It was not official action in the sense implied by the Court in Parham. The termination statutes also seek to avoid any erroneous deprivation by requiring a hearing on the petition, even if the parent fails to answer, or refuses to appear, or be heard. (G.S. §7A-289.28;See Appendix C). Certainly Petitioner was given a fair opportunity to answer, appear, and be heard. The trial court heard all the evidence, including hers, and concluded that her rights should be terminated. Petitioner has not heretofore availed herself of this claim of erroneous deprivation, and Respondent asserts she should not be allowed to do so now.

Petitioner's discussion of "the inequitable balance of resources" (Petition, p. 17), again confuses the determination of abuse, neglect, and dependency of children with termination actions. Any such imbalance in termination actions is equivalent to the situation where one individual who can afford an attorney, brings a civil action to determine some issue against another individual who cannot afford counsel. The Court has never required, under these circumstances, that the court appoint the indigent an attorney. As pointed out earlier, absolute equality is not required. Douglas v. California, supra.

Respondent cites Petitioner's further confusion of abuse, neglect and dependency proceedings and termination of parental rights actions in her assertion that "the amount saved by the prevention of erroneous placement of children in foster care may pay for the appointment of counsel in such cases." (Petition, p. 24). Foster care is a usual result of removal of custody in an abuse, neglect, or dependency proceeding pursuant to Chapter 7A, Article 44. However actions are brought by the Department of Social Services to terminate parental rights to children already in its custody specifically for the purpose of clearing children for adoption by new parents who can assume the costs of their care and thus remove them from foster care. (Emphasis mine). The money sought to be saved under Petitioner's theory has, in fact, already been spent before the Department of Social Services can ever initiate a Petition to terminate parental rights. Appointment of counsel would only be added expense. The refusal of the legislature to appoint counsel in termination proceedings results not from state parsimony,

but the quite logical reluctance of the state to pay for attorneys to represent individuals in actions which the state has no direct, specified interests.

In developing the right to appointed counsel this Court originally confined its focus to criminal cases. Powell v. Alabama, 282 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1956); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963). More recently, the Court has approved appointment of counsel in cases denominated civil, but with characteristics of criminal proceedings. In re Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967). As a civil action more closely resembles a criminal prosecution, the more closely does the Court scrutinize the need for appointed counsel.

In no way does this proceeding to terminate Petitioner's parental rights resemble a criminal proceeding. It was not prosecuted by the state, or in the name of the state. It was a discretionary act by the custodial Department of Social Services on behalf of one minor child to realize a statutorily created right, in his best interests, to a permanent plan of care including a home, family, and parents upon demonstration that the natural parents cannot provide such a plan. This is not at all like a criminal proceeding as defined by the North Carolina Constitution, Art. IV, Sec. 13(1):

> "Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof . . . ." (See Appendix D).

Neither can termination of parental rights be considered a legal punishment against the parent. To do so is in violation of Article XI Section 1 of North Carolina's Constitution which specifies what punishments are authorized. (See Appendix D). Though the consequences may be of great significance, this alone does not make the action criminal in nature. It is, and must be, held to be purely civil in nature.

Following the guidelines of previous decisions of this Court, Respondent asserts that in this action to terminate Petitioner's parental rights, the Due Process Clause of the Fourteenth Amendment to the Constitution required that she be given notice and opportunity to be heard. The legislative enactments under which the action was brought required that, and nothing more. Appointment of counsel for Petitioner was not authorized. Clearly, she was afforded such due process as was required in this action,

and her Petition presents no additional issue of constitutional magniture to this Court.

CONCLUSION

The appointment of counsel for the indigent parent in a purely civil proceeding to terminate her parental rights is not required by the Due Process Clause of the Fourteenth Amendment. The decision whether to provide counsel or not is, therefore, the prerogative of the legislature. It is not constitutionally required to provide counsel in this instance and has not done so. Consequently, the trial court was without authority to do so, ex mero motu.

For the reasons cited herein, Respondent asserts that the decision of the North Carolina Court of Appeals is correct, and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted, this the 14th day of July, 1980.

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[§ 2151.35.2] § 2151.352 Right to counsel.

A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have counsel provided for him pursuant to Chapter 120. of the Revised Code. If a party appears without counsel, the court shall ascertain whether he knows of his right to counsel and of his right to be provided with counsel if he is an indigent person. The court may continue the case to enable a party to obtain counsel or to be represented by the county public defender or the joint county public defender and shall provide counsel upon request pursuant to Chapter 120. of the Revised Code. Counsel must be provided for a child not represented by his parent, guardian, or custodian. If the interests of two or more such parties conflict, separate counsel shall be provided for each of them.

Section 2935.14 of the Revised Code applies to any child taken into custody. The parents, custodian, or guardian of such child, and any attorney at law representing them or the child, shall be entitled to visit such child at any reasonable time, be present at any hearing involving the child, and be given reasonable notice of such hearing.

Any report or part thereof concerning such child, which is used in the hearing and is pertinent thereto, shall for good cause shown be made available to any attorney at law representing such child and to any attorney at law representing the parents, custodians, or guardian of such child, upon written request prior to any hearing involving such child.

[§ 2151.35.3] § 2151.353 Disposition of neglected or dependent child.

If the child is adjudged an abused, neglected, or dependent child, the court may make any of the following orders of disposition:

(A) Permit the child to remain with his parents, guardian, or other custodian, subject to such conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child;

(B) Commit the child to the temporary custody of the department of public welfare, a county department of welfare which has assumed the administration of child welfare, county children services board, any other certified organization, the Ohio youth commission for the purpose of diagnostic study and report as provided by division (B) of section 5139.05 of the Revised Code, either parent or a relative residing within or outside the state or a probation officer for placement in a certified foster home;

(C) Commit the child to the temporary custody of any institution or agency in this state or another state authorized and qualified to provide the care, treatment, or placement that the child requires;

(D) Commit the child permanently to the county department of welfare which has assumed the administration of child welfare, county children services board, or to any other certified agency. Upon such commitment the natural or adoptive parents are divested of all legal rights and obligations due from them to the child or from the child to them.

No order for permanent custody shall be made at the hearing wherein the child is adjudicated abused, neglected, or dependent except and unless the complaint alleging the abuse, neglect, or dependency contains a prayer requesting such permanent custody and the summons served on the parents contains a full explanation that the granting of such an order permanently divests them of their parental rights.

APPENDIX B

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§ 7A-542. Protective services. — The Director of the Department of Social Services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the investigation and screening of complaints, casework or other counseling services to parents or other caretakers as provided by the director to help the parents or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents or caretakers, and to preserve and stabilize family life.

§ 7A-543. Duty to report child abuse or neglect. — Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give his name, address, and telephone number. Refusal of the person making the report to give his name shall not preclude the Department's investigation of the alleged abuse or neglect.

In the case of any report of abuse, the Director of Social Services, upon receipt of the report, may immediately provide the appropriate local law enforcement agency with information on the nature of the report. The law enforcement agency may investigate the report, and upon request of the Director of the Department of Social Services, the law enforcement agency shall provide assistance with the investigation.

§ 7A-544. Investigation by director; notification of person making the report. — When a report of abuse or neglect is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services shall be held in strictest confidence by the Department.

If the investigation reveals abuse or neglect, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 46 of this act.

§ 7A-561. Receipt of complaints; filing of petition. —

(b) All complaints concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the Director of the Department of Social Services for screening. Thereafter, if it is determined by the Director that a complaint should be filed as a petition, the petition shall be drawn by the Director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

(c) All complaints, and any decision of the intake counselor or of the Director of Social Services not to authorize that a complaint be filed as a petition shall be reviewed by the prosecutor pursuant to G.S. 7A-536 or G.S. 7A-547. If the prosecutor, after making his review, shall authorize a complaint to be filed as a petition, he shall prepare the complaint to be filed with the clerk as a petition, recording the day of filing.

§ 7A-516. **Purpose.** — This Article shall be interpreted and construed so as to implement the following purposes and policies:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

§ 14-316.1. **Contributing to delinquency and neglect by parents and others.** — Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Human Resources under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Division of Youth Services who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile.

§ 14-318.4. **Child abuse a felony.** — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child,

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies.

§ 7A-587. **Parent's right to counsel.** — In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.

§ 7A-289.28. Failure of respondents to answer. — Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j)(9)c if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition.

Sec. 13. *Forms of action; rules of procedure.*

(1) *Forms of Action.* There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.

Section 1. *Punishments.* The following punishments only shall be known to the laws of this State: death, imprisonment, fines, removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under this State.

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 79-6423

ORIGINAL COPY

ABBY GAIL LASSITER,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I. THE TRIAL TRANSCRIPT IS NOT SUBREPTITIOUSLY BEFORE THIS COURT.

Respondent has alleged that petitioner acted subpretitiously in referring to an official transcript of the trial record. [Respondent's Brief in Opposition, p. 1]. Petitioner contends that the trial transcript is not subreptitiously before this Court. In support of her contention, she alleges: (1) that an official trial transcript may be used for illustrative purposes, and (2) that the respondent and the North Carolina Court of Appeals are estopped from objecting to petitioner's use of the official trial transcript.

A. The Trial Transcript May Be Used for Illustrative Purposes.

Petitioner contends that she may use an official trial transcript to illustrate the need for court appointed counsel in proceedings to terminate the parental rights of indigent parents. To support this contention, petitioner shows: (1) that in the landmark case of Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed.2d 799 (1963), this Court allowed an official trial transcript to be used for illustrative purposes even though there were questions as to whether it was actually before the Flordia Supreme Court, and (2) that, like Gideon, petitioner's references to the official transcript were for illustrative purposes only.

1. In the landmark case of Gideon v. Wainwright, this Court allowed the trial transcript to be used for illustrative purposes even though there were questions as to whether it was actually before the Florida Supreme Court.

Clarence Earl Gideon filed a Petition for a Writ of Habeas Corpus to the Supreme Court of Florida without a trial transcript. [App. III, p. 2]. The Petition was denied without an opinion; Gideon filed a Writ of Certiorari to the Supreme Court of Florida; this Honorable Court granted that writ. [Id.], p. 3].

Counsel for Gideon used the trial transcript to illustrate the need for court appointed counsel for indigents during felony proceedings [App. II]; he included the trial transcript in his designation for printing [App. III, p. 3].

The respondent objected on the basis that "the Florida Court did not have before it the transcript of [the] trial proceedings . . . ." [App. III, p. 4]. This Court overruled respondent's objection, thus allowing the trial transcript to be included in the designated record and used for illustrative purposes. [Id.]

2. Petitioner's references to the trial transcript were for illustrative purposes only.

Like Gideon, petitioner's references to the trial transcript were to illustrate the need for court appointed counsel in proceedings to terminate the parental rights of indigent parents. [Petitioner's Writ of Certiorari to the North Carolina Court of Appeals, p. 19]. Petitioner's illustrative use of the transcript is clearly indicated by the language of her Petition for Writ of Certiorari:

> "Many of the difficulties heretofore, which occur frequently in termination cases when a parent is unrepresented by counsel, are typified in this case." Id.

B. Respondent and the North Carolina Court of Appeals Are Estopped From Objecting to Petitioner's Use Of An Official Trial Transcript, For Any Purpose.

As alleged by respondent, the parties did agree to a stipulated record on appeal.[1/] Yet, the respondent and the North Carolina Court of Appeals relied on facts outside the stipulated record to support their contention that procedural due process was granted in this case. Respondent relied upon such facts in his brief to the North Carolina Court of Appeals, and in his Brief in Opposition to this Court; the North Carolina Court of Appeals relied upon such facts in rendering its final decision. Neither the respondent nor the North Carolina Court of Appeals cited the source of their reliance.

Petitioner contends that this reliance estoppes the respondent and the North Carolina Court of Appeals from objecting to her use of the facts outside the stipulated record (especially when the facts used are from an official transcription of the trial court proceedings).

[1/] See the certified Record on Appeal transmitted to this Court by the North Carolina Court of Appeals.

1. Respondent relied upon facts outside the stipulated record.

In his brief to the North Carolina Court of Appeals, respondent contended that procedural due process was met in this case because notice and an opportunity to be heard were granted to petitioner. [Appellee's (Respondent's) Brief, p. 2]. To support his contention, respondent argued that petitioner was properly served and summoned, and that "[s]he was, in fact, present at the hearing and testified." [Id.] However, the stipulated record does not disclose that petitioner actually testified.[2/]

In Respondent's Brief in Opposition, respondent contends that petitioner "...with no difficulty and no cost..." was able to obtain counsel and that "...had she inquired, the Legal Aid attorneys in Durham would have represented her...." [Id. pp.4&5]. The factual basis for these speculations cannot be found in either the stipulated record or the trial record.[3/]

2. The North Carolina Court of Appeals relied upon facts outside the stipulated record.

During the oral argument, the North Carolina Court of Appeals solicited information from respondent's counsel that was not part of the stipulated record.[4/] [Respondent's Brief in Opposition, p. 1]. The Court of Appeals later relied upon that information in its opinion:

> "...[petitioner] took no action to obtain counsel, and appeared at the hearing only because counsel for [respondent] caused her to be broguht to Durham for the hearing." In the Matter of William L. LASSITER, 43 N.C. App. 525, 259 S.E.2d 336, 337 (1979).

[2/] See App. I; App. I is a statement of the case according to the stipulated record. The facts are recited in chronological order using only the documents found in the stipulated record on appeal before the North Carolina Court of Appeals.

[3/] See App. I and App. IV; App. IV is an official copy of the trial record.

[4/] Petitioner contends that the only competent source of such information is the trial record, notwithstanding the fact that respondent's attorney was able to answer the questions from personal knowledge since he actually participated in the trial court proceedings.

The North Carolina Court of Appeals relied upon additional facts outside the stipulated record to support its decision that procedural due process was not denied in this case:

> "At issue is whether due process requires the state to appoint and pay counsel to represent indigents in this situation. The requirements of procedural due process were certainly met in this case. [Petitioner] had ample notice of the hearing, was actually present when it was held, and was allowed to testify and cross-examine [respondent's] witnesses. See State v. Smith, 265 N.C. 173, 143 S.E.2d 293 (1965)." Id.

The stipulated record does not disclose that petitioner was allowed to cross-examine respondent's sole witness or to testify. [App. I].

CONCLUSION

The official transcript of the trial court proceeding is not subreptitiously before this Court--to the contrary, it was offered to illustrate rather than conceal the facts. Furthermore, respondent cannot deny the Court access to this official source of facts especially when respondent and the North Carolina Court of Appeals relied upon facts outside of the record on appeal without citing their source, official or otherwise.

Respectfully submitted this the 30th day of August, 1980.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a state to furnish an indigent parent court-appointed counsel in a proceeding to terminate permanently and irrevocably her parental rights.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6423

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
NORTH CAROLINA COURT OF APPEALS

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 43 N.C. App. 525, 259 S.E.2d 336 (1979). No opinion was written by the Supreme Court of North Carolina in denying petitioner's application for discretionary review and dismissing her appeal.

JURISDICTION

Petitioner's application for discretionary review and appeal were denied by the Supreme Court of North Carolina on January 17, 1980. Her petition for a writ of

certiorari was filed in this Court on April 16, 1980. The petition was granted by this Court on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States of America:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent statutes which this case involves are N.C. Gen. Stat. §§ 7A-289.22, 7A-289.23, 7A-289.24, 7A-289.25, 7A-289.26, 7A-289.27, 7A-289.28, 7A-289.29, 7A-289.30, 7A-289.31, 7A-289.32, 7A-289.33, 7A-300, 7A-450, and 7A-451. These are set forth in full in Appendix A, *infra*.

STATEMENT OF THE CASE

On April 10, 1978, the Durham County Department of Social Services filed a petition to terminate the parental rights of Abby Gail Lassiter wtih respect to her three and one-half year old son, William Lassiter. The petition also sought to terminate the parental rights of William Boykin, who was alleged to be the natural father of the child. The petition alleged, *inter alia*, that on May 23, 1975, the minor had been adjudicated a neglected child, in need of protection of the State, with legal custody granted to the Durham County Department of Social Services, which had subsequently placed the child in foster care. (J.A. 2).

With respect to Abby Gail Lassiter, the petition alleged that she was confined in state prison, having been convicted of second degree murder in July of 1976; that she had not had any contact with her child since December of 1975; and that without cause she had failed to establish or maintain concern or responsibility as to her child's welfare. It was also alleged that:

> . . . the mother has willfully left the child in foster care for more that two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child. (J.A. 2-3)

While confined in state prison, petitioner was served with a summons and a copy of the petition on April 12, 1978, but she failed to file an answer in response to the petition. (J.A. 16) On August 11, 1978 petitioner was notified by registered mail that a hearing would be conducted on August 31, 1978. Petitioner was brought to the hearing on August 31, 1978, but was not represented by counsel. The Durham County Department of Social Services was represented by its counsel, Mr. Thomas Odom. (J.A. 5. 16, 18)

Prior to the taking of testimony, the court discussed with petitioner her failure to secure representation by counsel. Petitioner stated that although she had informed officials at the North Carolina Correctional Center for Women of the pending legal action, officials at the institution had taken no action to assist her in finding legal counsel. (J.A. 16) The court ascertained that while she was in prison, petitioner had consulted with an attorney,

Thomas F. Loflin III, with respect to her criminal conviction, but she had not discussed with him the proceeding to terminate her parental rights. (J.A. 16) An affidavit filed subsequently by Thomas F. Loflin III confirms that he never discussed with petitioner any proceeding to terminate her parental rights with regard to her son, William; and that in view of petitioner's indigency, Mr. Loflin would not have been interested in representing her in the termination proceeding if she had requested that he do so. (J.A. 10-11)

At the conclusion of its colloquy with petitioner, the court determined that since petitioner had spoken with an attorney about her criminal conviction, but had failed to secure representation from him or from any other attorney with regard to the termination proceeding, the court would not appoint counsel to represent her, nor delay proceedings in order to afford her more time to obtain counsel. (J.A. 16) At the hearing the court heard evidence, found facts, and sustained the petition. (J.A. 5-7) On September 7, 1978, the court filed an order containing formal findings of fact. With respect to petitioner's non-representation by counsel, the court found specifically:

> 5. That subsequent to being served with a copy of the Summons and Petition, Abby Gail Lassiter communicated and conferred with her attorney regarding post-conviction proceedings, but did not seek counsel regarding this matter.
>
> 6. That Abby Gail Lassiter has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and her failure to do so is without just cause. (J.A. 6)

The court sustained the petition and ordered that all parental rights of petitioner and William Boykin in William Lassister be terminated.

A timely notice of appeal and exception to the District Court's failure to appoint counsel to represent petitioner were filed. (J.A. 9, 14, 15) On November 6, 1979, the North Carolina Court of Appeals unanimously affirmed the judgment of the District Court. *In the Matter of William L. Lassiter*, 43 N.C. App. 525, 259 S.E.2d 336 (1979). The court found that family integrity is a fundamental right protected by the United States Constitution. (J.A. 22) The court stated that although termination of parental rights does invade a constitutionally protected area of individual privacy, ". . . the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated." 259 S.E.2d at 337. On January 17, 1980 the Supreme Court of North Carolina denied petitioner's application for discretionary review and dismissed her appeal, without opinion. (J.A. 28)

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment guarantees the right of all persons who are forced to protect their rights through the judicial process to a meaningful hearing conducted in a meaningful manner. Where the state infringes upon a constitutionally protected interest, this Court had interpreted the Due Process Clause to require appointment of counsel for indigent parties in civil proceedings. Numerous state and federal court decisions have specifically held that indigent parents who are the subjects of termination (or functionally analogous dependency or neglect) proceedings

have a constitutional right to representation by court-appointed counsel. In fact, North Carolina's refusal to recognize such a right conflicts with the overwhelming trend of modern authority – caselaw, statutes, model codes and standards – which favor recognition of the parent's right to representation by counsel, in abuse, neglect, and termination cases.

In determining the exact parameters of procedural safeguards required by the Due Process Clause, this Court has promulgated a three-prong standard. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Application of this tripartite test to the case at bench requires a holding in favor of a right to counsel as an essential ingredient of due process.

First, the private interest at stake, the right to family integrity, has been consistently recognized by this Court as a fundamental right deserving the highest possible degree of constitutional protection. One of the principal legislative policies underlying North Carolina's legislative scheme for terminating parental rights is protection of children from unnecessary severance of their relationship with their parents. Hence, due process protections of parental rights originate also in the reasonable expectations engendered by state statute. Finally, termination proceedings based upon parental abuse or neglect always carry the possibility of criminal prosecution. Therefore, many termination cases implicate the parent's liberty interest in avoiding imprisonment; and counsel is necessary in order for the parent to make a reasoned decision whether to invoke her right to be free from self-incrimination.

Unless counsel is provided for indigent parents in termination cases, the risk of erroneous or inappropriate termination of parental rights is great. Under North Carolina law termination cases are formal, complex, adversarial proceedings in which the rules of evidence apply, and the court is required to make formal findings of fact and conclusions of law. Indigent parents, untrained in the law, are unable to present evidence, cross-examine witnesses, object to inadmissable evidence, conduct discovery, or do any of the numerous tasks which are second-nature to most lawyers. In addition, without the assistance of counsel, most parents will not know that N.C. Gen. Stat. § 7A-289.28 requires a parent to file a written answer to the petition within thirty days. Unless the parent files such a written answer, she waives her right to be notified of the termination hearing and to be present at the hearing.

Counsel for indigent parents is especially necessary because termination proceedings are generally brought by the social services department, which is represented by counsel, and which has assembled its case from governmental records compiled against the parent. The government has vast resources and has access to assistance from expert witnesses. Hence, there is a gross and inherent imbalance of expertise between the government and the impecunious parent who requires counsel to offset the resources, the power, and the legal representation of the governmental litigant. Termination cases are, therefore, clearly distinguishable from most traditional civil litigation involving only private parties which does not usually implicate fundamental rights. Without the parent's representation by counsel, it is also exceedingly likely that the termination decision will be based upon incompetent, inadmissible, and probably unreliable evidence.

The manner in which the hearing was conducted in the present case graphically illustrates why counsel is needed in termination cases. Numerous defenses were available to petitioner which she ignorantly failed to pursue. The court never made a finding, as is required by law, why the most drastic of all available alternatives – termination – was preferable to placing the child with petitioner's mother, who was ready and able to care for the child, and who was already taking care of petitioner's other children. Numerous evidentiary errors occurred. Petitioner was unable to understand the function of cross-examination, and could no effectively cross-examine the only witness who testified against her. By conducting extensive cross-examination of petitioner and the grandmother, the court impermissibly intertwined adversarial and judicial functions, thereby compromising its ability to remain neutral and objective.

This Court has never recognized expense or administrative inconvenience as a reason to deny counsel to an indigent litigant. In any event, the costs of providing counsel to indigent parents in termination cases would not be great since there are relatively few termination proceedings and the right to counsel is already guaranteed in at least thirty-five jurisdictions. Finally, since all states presently provide counsel for children in delinquency cases, and many states provide counsel for children or parents in neglect, abuse or dependency proceedings, it would be a minimal administrative inconvenience to expand these already functioning systems to include, as well, appointment of counsel for indigent parents in proceedings to terminate parental rights.

ARGUMENT

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES THE APPOINTMENT OF COUNSEL FOR AN INDIGENT PARENT IN A PROCEEDING TO PERMANENTLY AND IRREVOCABLY TERMINATE HER PARENTAL RIGHTS.

A. The Essence of Due Process is the Right to be Heard at a Meaningful Time in a Meaningful Manner.

Due process of law is a concept more elusive than real when a lay person is unrepresented by an attorney in a legal proceeding which, by its very nature, requires the guiding hand of counsel. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), this Court held that, absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process, ". . . must be given a meaningful opportunity to be heard." *Id.* at 377. The hearing required by due process must be granted at "a meaningful time in a meaningful manner" [*Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)] and must be "appropriate to the nature of the case" [*Mullane v. Central Bank of Hanover*, 339 U.S. 306, 313 (1950)].

Boddie v. Connecticut, supra, held that an indigent person cannot be denied the opportunity to obtain a divorce simply because she is too poor to pay filing and service of process fees. As Justice Black has recognized, divorce proceedings invariably involve the custody of children; and since the state under *Boddie* must provide

funds for an indigent mother's court costs incident to a divorce,

> . . . the State should also provide her with counsel [in abuse or neglect cases] to protect her rights to something far more important to most mothers and to society – her right to custody of her children.

Kaufman v. Carter, 402 U.S. 954, 960 (1971) (Black, J. diss. from denial of cert.)

As petitioner will demonstrate, the fundamental importance of a parent's right to the care and custody of her children, combined with the formal, complex nature of termination proceedings, requires that indigent parents who are subjects of such proceedings be afforded the opportunity to be represented by counsel.

B. Where the State Infringes Upon Fundamental, Constitutionally Protected Interests, the Due Process Clause Has Been Interpreted to Require Appointment of Counsel for Indigent Parties in Civil Proceedings.

While the Sixth Amendment to the United States Constitution specifically guarantees the right to counsel in criminal cases [*Gideon v. Wainwright*, 372 U.S. 335 (1963)], this Court has also found in the Due Process Clause of the Fourteenth Amendment an independent basis for a right to counsel in non-criminal proceedings when legal representation was deemed essential to vouchsafe due process. In *In re Gault*, 387 U.S. 1 (1967), this Court rejected the "civil" characterization of a juvenile

delinquency hearing as a "feeble . . . label of convenience"[1] in holding that the Due Process Clause of the Fourteenth Amendment guarantees the right of minors to be represented by counsel in delinquency proceedings. *Id.* at 41. In its opinion this Court quoted with approval the following findings of the President's Crime Commission in its *Task Force Report* which eloquently articulates the importance of representation by counsel as a fundamental ingredient of due process.

> The Commission believes that no single action holds more potential for achieving procedural justice for the child in juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be unaffected by prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal, have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. *Id.*, n. 65 at 38.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held, *inter alia*, that a welfare recipient has a constitutionally guaranteed right to be represented by retained counsel at a hearing to terminate her public assistance benefits. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), although only the limited liberty interest of a convicted

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[1] *Id.* at 50.

criminal was implicated, this Court, nevertheless, held that under some circumstances, fundamental fairness would require the state to provide, at its own expense, counsel for indigent probationers in probation revocation proceedings. *Id.* at 790.[2]

In a separate, but parallel line of cases, this Court has found in the Due Process Clause of the Fourteenth Amendment the principle that prisoners' free and full access to the courts must remain unimpaired. *Younger v. Gilmore*, 404 U.S. 15 (1971); *Johnson v. Avery*, 393 U.S. 483 (1969). Thus, in *Procunier v. Martinez*, 416 U.S. 396 (1974), this Court invalidated an administrative regulation precluding prisoners' access to law students and paralegals as inconsistent with prisoners' due process rights of access to the courts. And in *Bounds v. Smith*, 430 U.S. 817 (1977), this Court held that a prisoner's right to meaningful access to the courts requires provision of legal assistance in the preparation of habeas corpus and other writ petitions, at least when prisoners do not enjoy access to adequate law libraries.

Most recently, four justices of this Court held in *Vitek v. Jones*, 100 S. Ct. 1254 (1980), that a prisoner whom the state is seeking to transfer to a mental hospital for involuntary treatment has a constitutional right to be

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[2] In *Gagnon*, *supra*, this Court stated that, presumptively, counsel should be provided whenever the probationer alleges that he has not committed the alleged violation of probation or where he admits the violation but there are facts in justification or mitigation which are complex or otherwise difficult to develop or present. *Id.* As petitioner will discuss in Point III B and C, *infra*, termination proceedings invariably involve contested issues of fact, as well as assertions by the parent that the best interests of the child would be served by maintaining the parent-child relationship.

represented by counsel at the transfer hearing.[3] It is noteworthy that the plurality opinion of Justice White reached this conclusion although – in marked contrast to the case at bench – the hearing in *Vitek* would be administrative, rather than judicial, and involve essentially medical decisions, as compared to the explicit legal findings which must be made pursuant to statutory criteria under North Carolina law in a termination of parental rights proceeding. See N.C. Gen. Stat. § 7A-289.32.[4] Finally, although this Court has not yet resolved this issue, numerous federal district courts and courts of appeal have held that persons who are the subjects of various kinds of civil commitment proceedings enjoy a right to representation by counsel under the Due Process Clause of the Fourteenth Amendment.[5]

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[3]Although Justice Powell agreed with the plurality opinion that Jones was entitled to representation by an independent advocate, he felt that, in light of the medical issues involved, due process would be satisfied if representation were rendered by a competent non-lawyer such as a psychiatrist or other mental health professional. *Id.*, 100 S. Ct. at 1267.

[4]In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court held that children who are being admitted to state psychiatric hospitals by their parents do not have a due process right to be represented by counsel, although there must be some kind of inquiry by a neutral factfinder to determine whether state statutory standards for admission of the child to a hospital have been satisfied. *Parham* is clearly distinguishable from the present case in that it involved exercise of parents' traditional decision-making and authority over their children, whereas in termination of parental rights proceedings the state is not only intruding upon the sphere of parental authority, but is actually seeking to sever entirely the parents' relationship with their child.

[5]*Sarzan v. Gaughan*, 489 F.2d 1076 (1st Cir. 1973); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Johnson v. Solomon*,

[footnote continued]

In rejecting petitioner's constitutional claim below, the North Carolina Court of Appeals relied exclusively upon the "civil" nature of termination of parental rights proceedings. (J.A. 21-23) The court ignored the litany of caselaw, discussed above, which had found representation by counsel to be an essential ingredient of due process in civil cases where the government is seeking to deprive persons of fundamental, constitutionally protected rights and in which the hearing or other proceeding is sufficiently formal, complex, or otherwise burdensome so that assistance of counsel is essential.

C. The Decision of the North Carolina Court of Appeals is Contrary to the Overwhelming Weight of Modern Authority.

In its opinion below, the North Carolina Court of Appeals also failed to acknowledge that an overwhelming majority of the courts which have ruled on the issue have held that indigent parents do possess a constitutionally

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484 F. Supp. 278 (D. Md. 1979); *Dorsey v. Solomon*, 435 F. Supp. 725 (D. Md. 1977), *aff'd. in part*, 604 F.2d 271 (4th Cir. 1979); *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vac. and remanded on other grounds*, 414 U.S. 473 (1974), *judg. reinstated*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vac. and remanded on other grounds*, 421 U.S. 957 (1975), *judg. reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County General Hospital at Eloise*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Dixon v. Attorney General of the Commonwealth of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971).

guaranteed right to representation by counsel in termination of parental rights proceedings, both at the trial level[6] and on appeal.[7] In addition, a large number of state and federal courts have held that indigent parents possess an absolute, constitutionally guaranteed right to counsel in neglect or dependency proceedings.[8] Since the principal difference between a neglect or dependency adjudication and an order terminating parental rights is the length and finality of the deprivation of parental custody, with a termination order being final and irrevocable,[9] the above-cited dependency and neglect cases would *a fortiori* support an indigent parent's due process

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[6] *United States ex rel. Reed v. Tinder*, Civ. Action No. 75-0454 (S.D. W.Va. 1975); *Matter of Chad S.*, 580 P.2d 983 (Okla. Sup. Ct. 1978); *Crist v. Division of Youth and Family Services*, 320 A.2d 203 (N.J. Super. Ct. 1974), *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794, 799 (Me. Sup. Ct. 1973); *In re Friesz*, 208 N.W.2d 259 (Neb. Sup. Ct. 1973); *In re Adoption of R.I.*, 312 A.2d 601 (Pa. Sup. Ct. 1973), *appeal on other grounds*, 361 A.2d 294 (1976), *cert. den.*, 429 U.S. 1032 (1977); *State v. Jamison*, 444 P.2d 15 (Ore. Sup. Ct. 1968) (*dictum*).

[7] *Interest of Brehm*, 3 Kan. App.2d 325, 594 P.2d 269 (1979); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); *In re Welfare of Luscier*, 84 Wash.2d 135, 524 P.2d 906 (1974); *Chambers v. Dist. Court of Dubuque County*, 152 N.W.2d 818 (Iowa Sup. Ct. 1967) (*dictum*).

[8] *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980), *reh. en banc granted; Smith v. Edmiston*, 431 F.Supp. 941 (W.D. Tenn. 1977); *In re Welfare of Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1975); *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140 (W.Va. Sup. Ct. of App. 1974); *Crist v. Division of Youth and Family Services, supra; In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288 (1972).

[9] *Compare* N.C. Gen. Stat. §7A-289.33 (termination of parental rights) *with* N.C. Gen. Stat. §§7A-646 and 7A-657 (dependency, neglect, or abuse).

right to representation by counsel in a termination of parental rights proceeding.[10]

In fact, the only modern authorities which petitioner has found – other than the decision below – holding that an indigent parent is not entitled to representation by counsel in a termination, dependency, or neglect case have been substantially undermined by later decisions or statutory enactments.[11] Further indication of the critical importance of counsel is that numerous model codes, statutes, and rules require appointed counsel for indigent parents in termination of parental rights, dependency,

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[10]Three other cases hold that an indigent parent's constitutional rights to representation in a neglect or dependency case will be determined on a case-by-case basis in accordance with criteria enunciated by the appellate courts. *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974); *Brown v. Guy*, 476 F.Supp. 771 (D. Nev. 1979); *Potvin v. Keller*, 313 So.2d 703 (Fla. Sup. Ct. 1975), This approach was specifically rejected in *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980), *reh. en banc granted.* Since under the so-called *Cleaver* rule the principal factors determining under what circumstances a parent will be entitled to court-appointed counsel in dependency or neglect cases are the likelihood that the child will be placed outside his parents' home and the probable duration of that removal [499 F.2d at 945], the case-by-case approach is clearly inapplicable to termination proceedings where the effects of a termination order are the permanent removal of the child from his parent's custody and the total severance of the parent-child relationship.

[11]*Compare In re Robinson*, 8 Cal.App.3d 783, 87 Cal.Rptr. 678 (1970), *cert. den. sub nom. Kaufman v. Carter*, 402 U.S. 954 (1971), and *In re Joseph T.*, 25 Cal.App.3d 120, 101 Cal.Rptr. 606 (1972), *with In re Simeth*, 40 Cal.App.3d 982, 115 Cal.Rptr. 617 (1974) [statutory grounds], and *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974); *compare also In re Cager*, 251 Md. 473, 248 A.2d 384 (1968), *with* Md. Cts. and Jud. Proc. Code Ann. §13-821.

and neglect proceedings.[12] Although they are not themselves of constitutional significance, these model codes and statutes do indicate an almost universal recognition by legal scholars and concerned professional organizations of the necessity for legal representation of parents in these cases. Finally, at least thirty-four states and the District of Columbia now provide for appointed counsel for indigent parents in termination of parental rights proceedings by statute, many of these statutes having been enacted in recent years.[13] It is, therefore, self-evident that North Carolina is at variance with the overwhelming trend of modern authority in failing to recognize petitioner's right to court-appointed counsel in a termination of parental rights case.

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[12] IJA-ABA Juvenile Justice Standards Project, *Standards Relating to Counsel for Private Parties*, Standard 2.3(b) (1980); *Uniform Juvenile Court Act*, Section 26(a) (West's Uniform Laws Ann. 1979); Katz, *Freeing Children for Permanent Placement Through a Model Act*, Section 12, 12 Fam. L. Quarterly 203, 230 (1978); Lincoln, *Model Statute for Termination of Parental Rights*, Section 7(2), 27 Juvenile Justice 3, 6 (1976); National Council on Crime and Delinquency (NCCD), *Model Rules for Juvenile Courts*, Rule 39 (1969); U.S. Dept. of HEW, Children's Bureau, *Legislative Guide for Drafting Family and Juvenile Court Acts*, Section 25(b) (1969); U.S. Dept. of HEW, Children's Bureau, *Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children*, Part II, Section 8 (1961); NCCD, *Standard Juvenile Court Act*, Section 19 (6th ed. 1959).

[13] These statutes are cited in Appendix B, *infra*, which also contains a chart describing which states provide counsel for indigent parents in termination cases, and – if so – whether by statute or judicial decision.

D. In Determining the Precise Scope of Procedural Safeguards Required by the Due Process Clause This Court Has Applied a Three-Prong Standard.

As petitioner has demonstrated, the characterization of a termination of parental rights proceeding as "civil" is only the beginning of this Court's inquiry as to " 'what process is due' in [a] particular context." *Smith v. Organization of Foster Families*, 431 U.S. 816, 847 (1977). In determining the precise scope of procedural safeguards which are required by the Due Process Clause, this Court has articulated a three-prong test:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Petitioner will now discuss each of these criteria *seriatim* and demonstrate that application of the *Mathews* test to termination of parental rights proceedings leads to the ineluctable conclusion that provision of counsel for indigent parents is constitutionally compelled.

II.

THE PRIVATE INTERESTS AT STAKE IN TERMINATION OF PARENTAL RIGHTS CASES HAVE LONG BEEN RECOGNIZED AS OF PARAMOUNT IMPORTANCE AND FUNDAMENTAL TO OUR CONSTITUTIONAL SCHEME OF ORDERED LIBERTY.

A. The Right to Family Integrity Is Among the Most Fundamental Rights Known to Man.

One of the most significant factors to be considered in determining the scope of due process protections is the nature of the private interest affected by the official act. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In this case the state deprived petitioner permanently and irrevocably of her right to care for, nourish, raise, educate, and enjoy the companionship of her four year old child. It is scarcely possible to conceive of a right more fundamental in a constitutional sense, or one which has been more scrupulously protected by this Court.

In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), the Court stated:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we pass down many of our most cherished values, moral and cultural. *Id.* at 503-504.

In *Moore*, *supra*, this Court recognized that a host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S.

390 (1923),[14] and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), have consistently acknowledged a " 'private realm of family life which the state cannot enter' [citation omitted.]" 431 U.S. at 499. In *Stanley v. Illinois*, 405 U.S. 645 (1972), this Court cited many of its prior decisions in holding that a parent's right to the care and custody of her children is fundamental to our society and entitled to the highest degree of constitutional solicitude. *Id.* at 651. Recent decisions by this Court have reached the same conclusion. *See, e.g., Parham v. J. R.*, 442 U.S. 584 (1979); *Caban v..Mohammed*, 441 U.S. 380 (1979); *Smith v. Organization of Foster Families*, 431 U.S. 817 (1977).

Many of the decisions by this Court stressing the constitutional protections afforded the family have been rendered in cases involving a single aspect of parental rights. *See, e.g., Parham v. J. R., supra*, [medical decision]; *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [education and inculcation of morality]. However, in this case the state power impinges upon the entire fabric of parent-child relations since, under North Carolina law, a decision to terminate parental rights permanently and irrevocably severs the relationship between parent and

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[14] In *Meyer* this Court noted, "it has long been accepted by this Court that the liberty aspect of the Due Process Clause 'denotes not merely freedom from bodily restraint, but also the right of the individual to . . . establish a home and bring up his children.' [citation omitted.]" *Id.* at 399. In other decisions this Court has found that the right to exercise choice concerning matters of family life – such as whether or not to bear children – is a protected aspect of the right of personal privacy. *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (Goldberg, J., conc.).

child. N.C. Gen. Stat. § 7A-289.32.[15] For this reason the parental rights implicated herein are not only fundamental in a constitutional sense, but, as one court found, are ". . . more precious to many people than the right to life iteself." *In re Gibson*, 483 P.2d 131, 135 (Wash. Ct. of App. 1971).

B. Most Termination of Parental Rights Cases Involve Allegations of Conduct By Parents Which, If True, Would Subject the Parents to Criminal Prosecution.

Although termination of parental rights cases are clearly civil in nature, they resemble criminal proceedings and, in some instances, lead to criminal prosecution. As Justice Black has recognized with respect to the functionally analogous abuse or neglect proceeding:

> The case by its very nature resembles a criminal prosecution. The defendant is charged with conduct – failure to care properly for her chidren – which may be criminal and which in any event is viewed as reprehensible and morally wrong by a majority of society. *Kaufman v. Carter*, 402 U.S. 954, 959 (1971) (Black, J. diss. from den. of cert.)

In North Carolina, as in every other jurisdiction,[16]

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[15] In other jurisdictions a court decision terminating parental rights similarly deprives a parent of her right to ever again regain custody of her children. Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. 623, 633 (1976).

[16] Katz, Howe, and McGrath, *Child Neglect Laws in America*, 9 Fam. L. Q. 1, Table X at 47-49 (1975).

parental rights may be terminated, based in whole or in part, upon a finding that a parent has physically abused or neglected her child. N.C. Gen. Stat. § 7A-289.32(2). In proceeding under this subsection the state necessarily must prove that the parent has physically abused or neglected her child, conduct which is a basis for criminal prosecution.[17]

Therefore, in many termination of parental rights cases not only is the integrity of the family in peril, but the parent is also confronted with the possibility of a later criminal prosecution based upon the same conduct which is at issue in the termination proceeding. For this reason many courts have found provision of counsel essential in order for the parent to make an informed decision as to whether she should testify, seek immunity, or attempt to limit her potential for self-incrimination in some other way. *See State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140, 144, (W. Va. Sup. Ct. of App. 1974); *Crist v. Division of Youth and Family Services*, 320 A.2d 203 (N. J. Super. Ct. 1974); *Danforth v. State Dept. of Health and Welfare*, 303 A.2d 794, 799-800. (Me. Sup. Ct. 1973); *see also* Catz and Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 13 Jour. of Fam. Law 223, 242 (1973-74); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L. J. 887, 888 (1975). The self-incrimination problem in termination cases resembles that in *Maness v. Myers*, 419 U.S. 449 (1975), in which Justice Stewart – in an opinion joined by Justice

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[17] For example, N.C. Gen. Stat. § 14-318.4 makes child abuse a felony, and N.C. Gen. Stat. § 14-316.1 makes it a misdemeanor for a parent to contribute to the neglect of her child.

Blackmun – found that the constitutional right not to incriminate oneself encompasses the right to some advice of counsel concerning exercise of the privilege in the first instance. *Id.* at 471.

III.

THE RISK OF ERRONEOUS TERMINATION OF PARENTAL RIGHTS IS MANIFEST UNLESS COUNSEL IS AVAILABLE TO SAFEGUARD THE PARENTS' RIGHTS.

A. The Nature of the Termination of Parental Rights Proceeding

The second prong of the *Mathews* test is the risk of erroneous deprivation of the private interest, as well as the probable value of additional procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Before the utility of counsel as a procedural safeguard can be fully appreciated, it is first necessary to describe how termination of parental rights cases are initiated and prosecuted under North Carolina law.

North Carolina follows the practice of at least twenty-three other states in providing for a separate termination proceeding independent of a neglect or dependency adjudication in juvenile court. Areen, *supra*, n. 213 at 929 (1975).[18] Like many other jurisdictions,[19] North Carolina also provides that a child may be adopted without parental consent when the court makes a finding

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[18] In twelve states, a court may order termination of parental rights as a disposition following a juvenile court finding that the child has been abused or neglected. Wald, *supra.*, 633-634 (1976).

[19] Areen, *supra*, at 928 n.211.

during the adoption proceeding that the parent has abandoned the child. N.C. Gen Stat. § 48.5.[20]

Under North Carolina law a proceeding to terminate parental rights is commenced by the filing of a verified petition by any of several enumerated persons or agencies, including any county department of social services or child-placing agency to whom custody of the child has been given by a court of competent jurisdiction. N.C. Gen. Stat. §§ 7A-289.24, 7A-289.25.[21] The legislative policy underlying the termination of parental rights procedure is threefold: (1) to provide a mechanism for terminating the legal relationship between parents and children when the parents have demonstrated that they will not promote the physical and emotional well-being of the children; (2) to protect children from unnecessary severance of their relationship with their parents[22] while providing a permanent

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[20]This procedure was not utilized in the case at bench, and there is no evidence in the record indicating whether petitioner's son has been, or ever will be, adopted. The sole proceeding before this Court is a separate termination of parental rights proceeding brought by the county social services agency.

[21]Statutory references are to the statutes in effect when the hearing was conducted in the case at bench on August 31, 1978. These statutes are set forth in full in Appendix A, *infra*.

[22]As the court stated in *In the Matter of Dinsmore*, 36 N.C. App. 720, 245 S.E.2d 386, 389 (1978), "Manifestly, the termination of parental rights is a grave and drastic step . . . . Parental rights are to be protected regardless of the economic situation of the individual parent." Since North Carolina case law specifically recognizes the right of parents and children alike not to have their relationship unnecessarily abrogated, this is a case where due process protections originate, not only in the constitutionally protected right to family integrity, but also in the reasonable expecta-

[footnote continued]

plan at the earliest possible age when termination is necessary; and (3) to protect the best interests of the children. N.C. Gen Stat. § 7A-289.22.

The petition must allege facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists. N.C. Gen. Stat. § 7A-289.25. These grounds are set forth in N.C. Gen. Stat. § 7A-289.32. Except when the identity or location of the parents is unknown, a summons will issue requiring the parents to answer the petition within thirty days. N.C. Gen. Stat. § 7A-289.27. If the parents fail to file a timely written answer, the court shall issue an order terminating all parental rights in the child, provided that the court first conducts a hearing at which the court may examine the movant or others about the facts alleged in the petition. N.C. Gen Stat. § 7A-289.28. If a written answer is not filed, there is no requirement that the parents be notified of the hearing date, or that they be physically present at the termination hearing. *Id.* If the parent's answer denies any material allegation in the petition, the court shall: (1) appoint a licensed attorney as *guardian ad litem* for the child; and (2) after giving at least ten days notice conduct a hearing to determine the issues raised by the petition and answer. N.C. Gen. Stat. § 7A-289.29.

In North Carolina any party may appear in a termination proceeding represented by an attorney. However, in only two specific instances are indigent parents entitled to court-appointed counsel – parents under the age of

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tions engendered by state statute. *See Vitek v. Jones*, 100 S.Ct. 1254 (1980); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

fourteen and, effective August 23, 1979, parents with certain mental defects. N.C. Gen. Stat. § 7A-289.23 (Cum. Supp. 1980). If the case is initiated by the county department of social services, the district attorney or county attorney will represent the department in the termination proceeding.

North Carolina procedure bifurcates the court's consideration of adjudication from its consideration of disposition. N.C. Gen. Stat. §§ 7A-289.30, 7A-289.31. At the adjudicatory hearing the court hears evidence; and in order to sustain the petition it must find facts based upon a preponderance of the evidence regarding the existence of the circumstances set forth in one of the subsections of N.C. Gen Stat. § 7A-289.32.[23] The court may order the child or parent to be examined by a psychiatrist, psychologist, physician, or other suitable expert. N.C. Gen. Stat. § 7A-289.30(b). There is only one form of civil action under North Carolina law. N.C. Gen. Stat. § 1A-1, Rule 2. Hence, termination of parental rights proceedings are subject to the same rules which govern the conduct of all civil cases. N.C. Gen. Stat. § 1A-1, Rule 1. Hearsay is inadmissible, records must generally be authenticated, and the full panoply of evidentiary rules governing the admissibility of evidence are applicable. *See, e.g.*, N.C. Gen. Stat. § 1A-1, Rules 1, 43, 44, 46.

If the court determines that one or more of the grounds in N.C. Gen. Stat. § 7A-289.32 has been established by the required quantum of admissible evidence, at the

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[23]Effective June 28, 1979, the standard of proof in termination proceedings was changed from a "preponderance of the evidence" to "clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7A-289.30 (Cum. Supp. 1979).

dispositional hearing the court shall issue an order terminating parental rights, unless the court further finds that the best interests of the child require maintenance of the parent-child relationship. N.C. Gen. Stat. § 7A-289.31. Irrespective of whether the court sustains or dismisses the petition, the court must make appropriate findings of fact and conclusions. N.C. Gen. Stat. §§ 7A-289.30(e); 7A-289.31 (b)(c). An order terminating parental rights completely and permanently ends all rights and obligations of the parent to the child and of the child to the parent, except that the child's right of inheritance continues until such time as the child may be adopted. N.C. Gen. Stat. § 7A-289.33.

B. If the Parent is Unrepresented by Counsel, There is a Substantial Risk of Erroneous Deprivation of Parental Rights.

As is evident from petitioner's discussion of the North Carolina termination of parental rights scheme, termination occurs in the context of a formal, adversarial proceeding in which the guiding hand of counsel is essential if indigent parents are to be provided with a meaningful opportunity to contest the allegations in the petition. Presenting evidence, cross-examining witnesses, filing an answer to the petition, locating experts or obtaining court-appointed experts, conducting discovery, objecting to evidence – these are second nature to the skilled advocate, but remain beyond the comprehension of most parents who are involved in termination of parental rights cases.[24] As this Court stated in *Gideon v. Wainwright*,

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[24] Further compounding the difficulties inherent in self-representation is the fact that most parents who are the subjects of

[footnote continued]

372 U.S. 335 (1963), in language equally applicable to parents in termination of parental rights proceedings,

> . . . in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an absolute truth. *Id.* at 344.

Without representation by counsel, uninformed, unintelligent waivers of the right to a contested hearing are likely to occur. *Cf. Carnley v. Cochran*, 369 U.S. 506 (1962). This is because under N.C. Gen. Stat. § 7A-289.28 if the parent fails to file a timely, written answer to the petition, the court shall, after conducting a hearing, terminate all parental rights without being required to examine the movant or hear other evidence. It is exceedingly unlikely that a parent, untutored in the law, would be aware of the requirement that a written answer to the petition must be filed; and even if *arguendo*, the court disposed with the requirement of a written answer, most

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termination proceedings are, like petitioner, poor and lacking in formal education. *See, e.g. Note: The Custody Question and Child Neglect Rehearings*, 35 U. of Chi. L. Rev. 478 (1968); Kay and Phillips, *Poverty and the Law of Child Custody*, 54 Cal. L. Rev. 717, 734-35 (1966); Paulsen, *Juvenile Courts, Family Court and the Poor Man, The Law of the Poor*, 370 (J. Ten Broek ed. 1966). A recent North Carolina study of parents of foster children, who are the same parents who become defendants in termination proceedings, shows that they are generally unemployed or employed in unskilled labor, have an average education level of the eighth grade, and have an average income of $6,000 for a family of four. Governor's Advocacy Council on Children and Youth, *Why Can't I Have A Home?: A Report on Foster Care and Adoption in North Carolina, 16-17 (Dec. 1978)* [hereinafter cited as Governor's Advocacy Report].

parents would find it impossible to analyze the statutory framework, apply it systematically to the case, and reacha an educated conclusion as to whether the movant has alleged a *prima facie* case justifying termination, or whether they have a legitmate defense.[25] To paraphrase from this Court's opinion in *In re Gault*, 387 U.S. 1 (1967),

> The [parent] needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. *Id.* at 35.

If a parent is not represented by counsel, it is to be anticipated that valuable judicial resources will be expended on cases that should not go to trial. If the available information suggests that the movant will experience no difficulty in establishing one of the statutory

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[25] In many cases state statutes are exceedingly vague in defining the substantive basis upon which parents' rights to the custody and control of their children may be terminated. In fact, several termination statutes have been invalidated on vagueness grounds [*Roe v. Conn.*, 417 F.Supp. 769 (M.D. Ala. 1976); *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd on other grounds*, 545 F.2d 1137 (8th Cir. 1976); *Davis v. Smith*, 583 S.W.2d 37 (Ark. 1979)]; and the vagueness of a state termination of parental rights statute is currently before the Court. *Doe v. Delaware*, 407 A.2d 198 (Del. Sup. Ct. 1978) (partial report of decision), *prob. juris. noted* 43 U.S.L.W. 3613 (3/24/80). Where termination statutes are vaguely drafted, representation by counsel is particularly important to ensure that termination will only occur after a particularized showing of parental unfitness, and not upon the constitutionally infirm notion that termination was " 'thought to be in the children's best interests.' [citation omitted.]" *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

grounds for terminating parental rights, the parent's attorney may perform an invaluable role in suggesting to the parent that she concentrate on the dispositional phase where she may still seek to convince the court that termination would not be in the child's best interests. In addition, when counsel is not furnished to the parent, considerable judicial time will have to be expended in eliciting information and explaining procedures which would be familiar to an attorney.

In many states services exist which, if properly used, could prevent removal of children from their parents or assist the parents to remedy the basis for the initial removal. Such services include daycare, homemaker, facilitation and monitoring of visiting, psychiatric, nutritional, or job counseling, assistance in locating a more suitable abode, or use of an extended family member to help care for the children. It is now widely agreed that such services should be attempted before the drastic step of terminating parental rights is consummated. Wald, *supra*, 676-84; Children's Defense Fund, *Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care* 25-25 (1978); Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 Geo. L.J. 213, 246-47 (1979); Child Welfare League of America, *New Approaches to Homemaker Services* (Rev. Ed. 1968).[26]

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[26] Under the recently enacted Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, Congress has authorized the appropriation of $266,000,000 each fiscal year to the states for the purpose of establishing, extending, and strengthening child welfare services intended, in part, to prevent unnecessary or inappropriate removal of children from their parents' custody. 42 U.S.C. §620 *et seq.*

Yet recent studies in North Carolina and elsewhere demonstrate that parents typically are not offered family reunification services after their children are placed in foster care.[27] When such services have not been utilized, counsel can frequently negotiate a plan under which family reunification services will be provided. In many instances valuable judicial resources will be conserved because termination will prove unnecessary. Even if provision of services fails to result in family reunification, the court's decision whether to terminate parental rights will not be obscured by the court's belief that the parent has been treated unfairly or that timely provision of services could have prevented the necessity for termination. *See, e.g., Interest of Walter B.*, 577 P.2d 119 (Utah Sup. Ct. 1978); *In re Susan M.*, 53 Cal. App.3d 300, 125 Cal. Rptr. 707 (1976).

When the termination petition culminates in a contested adjudicatory hearing, the risk of error if the parent proceeds without legal representation is particularly grave. A layman who is enmeshed in such a proceeding is confronted by a specialized body of law, replete with formal rules of evidence, which he can scarcely hope to understand. As occurred in the present case, the social services department is represented by an attorney who has assembled a case from welfare, probation, and police records, and who has access to expert assistance from

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[27] A North Carolina study reports that 59% of the natural parents surveyed said they received no services after their child was placed in foster care. *Governor's Advocacy Report, supra,* 48-49 (1978); see also Children's Defense Fund, *supra,* 15-21; Vasaly, *Foster Care in Five States: A Synthesis and Analysis of Studies from Arizona, California, Iowa, Massachusetts and Vermont,* note 16 at 34-35.

medical, psychological, and social work professionals. There is, therefore, ". . . a gross inherent imbalance of expertise between the parties if the parents are not represented by counsel." *In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 290 (1972); *see*, Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 Ariz. L. Rev. 1055, 1080 (1975).[28] As one commentator has sagely recognized:

> Among the clearest cases of injustice in the civil process are those in which the state brings suit against an indigent and unrepresented defendant . . . in its role as . . . parens patriae. The defendant, unable because of his poverty to present his case properly, is overborne by lawyers and other litigative resources paid for out of the public treasury.

Note: *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L. J. 545, 556 (1967)[29]

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[28]The parent's difficulty in representing herself is likely to be compounded by the reality that most parents who are the subjects of termination proceedings are ill-equipped to respond in terms of their intellectual and emotional resources. *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55, 63-64 (1976); *Crist v. Division of Youth and Family Services*, 320 A.2d 203, 207 (N.J. Super. Ct. 1974).

[29]Ironically, under North Carolina law appointment of an attorney as *guardian ad litem* to protect the child's interests will frequently depend upon the parent securing representation by counsel. This is because the district court must appoint an attorney as *guardian ad litem* for the child only if the parent files a written answer denying a material allegation in the petition. N.C. Gen. Stat. §7A-289.29. Unless the parent is represented by counsel, it would appear unlikely in most cases that such written answers would be filed.

Unrepresented by counsel, a parent lacks the legal training and knowledge of evidentiary rules and courtroom procedures necessary to present her case properly in an adversary proceeding. *In re Adoption of R.I.*, 312 A.2d 601, 602-603 (Pa. Sup. Ct. 1973). For example, if a social report or hospital record is introduced against a parent, full of second or third-hand information, and couched in psychological jargon, is that report admissible? If it is admitted, how can the parent controvert its conclusions? If there are witnesses whose testimony would be helpful, how can they be compelled to appear? Psychiatric or medical evidence may be disirable or necessary, but how does an indigent parent secure the services of such an expert? If a less restrictive alternative to termination exists which has never been attempted, is a parent likely to be aware of what services or other resources exist, and to be able to present such an alternative plan to the court in a credible manner?

The answer to each of these admittedly rhetorical questions is, petitioner suggests, that indigent parents are simply not capable of adequately protecting their interests in a forum which must remain for them a hopeless mystery. The following description of a parent's conduct in a dependency proceeding is typical of most parents who are compelled to defend themselves in government initiated proceedings to deprive them of the care and custody of their children:

> Without benefit of counsel, Hilary Davis was little more than a spectator in the adjudicatory proceeding. She was ignorant of the law of evidence, and of the substantive law governing dependency proceeding. She sat silently through most of the hearing. . . .

Davis v. Page, 442 F. Supp. 258, 260 (S.D. Fla. 1977), *aff'd.* 618 F.2d 374 (5th Cir. 1980), *reh. en banc granted.*

Without provision of counsel, the likelihood that a decision to terminate parental rights will be based upon incompetent or inadmissible evidence is dramatically enhanced. The court's description of the hearing in *State v. Jamison*, 444 P.2d 15 (Ore. Sup. Ct. 1968), is also representative of the vast majority of termination proceedings where the parent is compelled to defend herself without the assistance of counsel:

> Without counsel, the informality usually associated with ex parte hearings prevailed. The juvenile court was led to proceed on the basis of incompetent evidence and evidence that had remote, if any, connection with the issues made up by the petition. . . . *Id.* at 17.

As the court aptly concluded,

> The case at bar was routine for the welfare workers and other juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible. *Id.*

Two studies conducted in New York dramatically emphasize the difference which an attorney makes in a neglect or dependency proceeding.[30] In the first study a

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[30]Since termination hearings are at least as formal, complex, and adversarial as neglect or dependency hearings, usually being conducted in accordance with formal rules of evidence, the conclusions of these studies would, *a fortiori*, apply to termination proceedings as well.

substantial majority of 28 family court judges in New York City responding to a questionnaire indicated that a parent's failure to obtain counsel hindered the court's development of the facts and made it more difficult to conduct a fair hearing.[31] The other study contains results which are even more startling. When parents are unrepresented by counsel, the court is substantially more likely to sustain a neglect petition than when parents are represented by an attorney; and when the parents are unrepresented, there is more than twice as great a chance that the court will order the children removed from their parents' custody.[32] These studies provide strong empirical support for the proposition that when the government is seeking to deprive a parent, unrepresented by counsel, of

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[31] 66.7% of those responding stated that the parent's failure to obtain counsel in neglect proceedings hindered the court's development of the facts; 72.2% stated that it was more difficult to conduct a fair hearing; and 94.4% acknowledged as a problem the delay caused by adjournments necessary to afford parents an opportunity to secure counsel. *Representation in Child-Neglect Cases: Are Parents Neglected,* 4 Colum. J. of L. and Soc. Prob. 234, 235 (1968).

[32] This study was conducted of all neglect cases docketed in Kings County, New York during 1966. It was done by examination of court records. Where parents are unrepresented against institutional petitioners, 79.5% of the proceedings resulted in neglect adjudications, while 16.6% of the petitions were either withdrawn or dismissed. But where parents were represented by counsel, only 62.5% of the proceedings resulted in neglect findings, and 37.5% of the petitions were withdrawn or dismissed. Moreover, where neglect was found, 40.6% of the children of parents unrepresented by counsel were placed out of the home, whereas only 18.2% of children of parents represented by counsel were placed. *Representation in Child-Neglect Cases: Are Parents Neglected,* 4 Colum. J. of L. and Soc. Prob., 230, tables at 241-242 (1968).

her parental rights, the risk of error is unacceptably high.[33] *See, In re Welfare of Luscier*, 84 Wash. 2d 135, 524 P.2d 906, 908 (1974).

C. The Presence of Counsel Would Have Numerous Salutary Effects Upon the Judicial Process as Illustrated by the Hearing in the Case at Bench.

In the case at bench the order terminating parental rights found that Abby Gail Lassiter was serving a sentence of twenty-five to forty years which was imposed in July of 1976 for the crime of murder in the second degree. (J.A. 5) However, under North Carolina law neither conviction of a crime nor incarceration for a

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[33]There are three distinct types of errors which are likely to occur when a parent is unrepresented by counsel, each of which falls within the "erroneous deprivation of such interest" standard of *Mathews v. Eldridge, supra*, at 335. First, as discussed above, parents will suffer inappropriate terminations of parental rights. Second, the court's decision to terminate parental rights is likely to be based on incompetent, inadmissible, and possibly prejudicial evidence. *State v. Jamison, supra; Davis v. Page, supra; Reist v. Bay County Circuit Judge, supra.* Not only does such evidence tend to be unreliable, but, of equal significance, the parent will be deprived of a fundamentally fair termination hearing conducted in accordance with state evidentiary rules and statutory requirements. *See, In re Gault, supra*, 30, 56-57; *Jackson v. Denno*, 378 U.S. 368 (1964) [even if a defendant is guilty, his conviction cannot constitutionally be based upon an involuntary confession]. Third, the uncounselled parent will be unable to protect her right to be free from self-incrimination, and may engage in an unknowing waiver of such right. See cases and other authorities cited at p. 21-23, *supra.* Under North Carolina law, admissions made in a termination proceeding can be used against a parent in a criminal case involving child abuse or neglect, regardless of a decision to assert the privilege in the criminal trial. *See generally, State v. Ferrell*, 223 N.C. 804, 28 S.E.2d 560 (1944); *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E.2d 903 (1972), *cert. denied*, 282 N.C. 430, 192 S.E.2d 840 (1972).

lengthy perod of time is a statutory basis for termination of parental rights. N.C. Gen. Stat. §7A-289.32. As the court stated in *In the Matter of the Adoption of Maynor*, 38 N.C. App. 724, 248 S.E.2d 875 (1978),

> The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a 'settled purpose to forego all parental duties.' [citation omitted.] *Id.* at 877.

Since neither conviction of a crime nor extended incarceration itself warrants termination of parental rights, respondent sought termination under N.C. Gen. Stat. § 7A-289.32(1)[34] and (3) upon the alleged bases:

> 6. That the mother has not had any contact with the child since December of 1975. That the mother has without cause, failed to establish or maintain concern or responsibility as to the child's welfare.
>
> 7. That the mother has willfully left the child in foster care for more than two consecutive years without either showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child or to make and follow through with constructive planning for the future of the child. (J.A. 3)

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[34]N.C. Gen. Stat. §7A-289.32(1) was repealed on May 29, 1979.

N.C. Gen. Stat. § 7A-289.32(1) requires that a parent's faliure to establish or maintain concern or responsibility for her child's welfare be "without cause"; and N.C. Gen. Stat. §7A-289.32(3) requires that the parent has "willfully" left the child in foster care for more than two years. These statutes have been strictly construed by North Carolina appellate courts to protect the fundamental rights of parents to the care and custody of their children.[35] Therefore, a defense, apparent on the face of the pleadings, is that during the majority of the two years in issue (April of 1976 through April of 1978) petitioner was in prison and, as a result, did not "willfully" or "without cause" leave her son in foster care or fail to establish or maintain concern for his welfare.

It would also appear that the petition in this case was brought under statutory subsections which were never intended to apply to petitioner's situation. Numerous potential defenses to the petition existed, but were never developed at the hearing because petitioner was unrepresented by counsel. For example, N.C. Gen. Stat. § 7A-289.32 requires the social services department to make "diligent efforts" to reunite the family; but this provision would appear inapplicable to a mother serving an extended prison sentence. Moreover, in view of the

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[35] In *In the Matter of Dinsmore*, 36 N.C. App. 720, 245 S.E.2d 386 (1978), the court held that evidence of non-support of a child as a result of a parent's alcoholism is insufficient to warrant a finding of *willfull* [emphasis added] failure to support or abandonment. In *Matter of Godwin*, 31 N.C. App. 137, 228 S.E.2d 521 (1976), the court held that the refusal of a father to submit to counselling in order to determine his suitability as a parent did not constitute "serious neglect" within the meaning of the termination statute. *See also, Forsyth County Department of Social Services v. Roberts*, 22 N.C. App. 658, 207 S.E.2d 368 (1974).

uncontroverted testimony by petitioner's social worker that she had visited petitioner only once in prison, during either December of 1977 or January of 1978,[36] considerable doubt existed as to whether the "diligent efforts" requirement imposed by N.C. Gen. Stat. § 7A-289.32(3) was satisfied.[37]

A crucial, undeveloped issue at the hearing was whether petitioner had "willfully" left her son in foster care for two years without making "constructive" plans for his future [N.C. Gen Stat. § 7A-289.32(3)]. The social worker testified that, at their meeting in prison, petitioner had asked her to place her child with her mother (RT 15); and it was petitioner's consistent position at the hearing that her child should be placed with the grandmother, with whom her four other children were already residing. (RT 40) Although the social worker testified that Lucille Lassiter, the child's grandmother, had told her that caring for William would be more than she could handle (RT 14), this was flatly denied by the grandmother who testified that she was ready, willing, and

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[36] RT 10, 15. References denoted "RT" are to the certified transcript of the hearing conducted August 31, 1978. A copy of this certified transcript has been lodged by petitioner with the Clerk of this Court.

[37] A recent survey of foster care in North Carolina supports the conclusion that such "diligent" efforts are rarely made.

> Because of excessively high caseloads, administrative duties, and paperwork, foster care social workers are able to spend only an average of 48 minutes a month on direct, in person work with each foster child . . . Once the state has removed the child from his home, it has little contact with the natural parents and [the state] provides few services to help stabilize and reunite the family. . . . Governor's Advocacy Report, *supra*.

able to take care of William.[38] Certainly, on its face, arranging for a child to be cared for by his grandmother would appear to be a "constructive plan" for the child's future sufficient to defeat a petition under that part of N.C. Gen. Stat. § 7A-289.32(3).

In *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977), the Court recalled:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Id. at 504.

In his concurring opinion in *Moore, supra*, Justice Brennan recognized the profound, cultural importance of extended family ties to black families, such as the Lassiters. *Id.* at 509-10. No reason appears in the trial record why William could not have been placed with his grandmother until such time as his mother was discharged from prison or he attained adulthood.[39] The drastic step

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[38] ". . . I definitely told her [the social worker] that I could take this child because I have four and I said now, the girl wants me to have the child and I would like for all of them to be together because she is – I got four children, she is the only one that have children and that's personally my family and it's all the family we have and I said I want all her children." (RT 52)

[39] Petitioner is eligible for parole after she serves one fifth of the maximum penalty prescribed by law, which in this case would be eight years, less credit for time served. N.C. Gen. Stat. § 15A-1355 (b)(c). The hearing transcript does not reveal whether the court was cognizant of this fact.

of terminating parental rights was taken by the court even though placement with the extended family was the most feasible plan. It would have kept the parent-child relationship intact; it would have permitted the extended family to meet the family crisis; it would have preserved the child's relationship with his siblings; and it would have conserved fiscal resources which should only be expended when the extended family cannot suitably handle the situation.

N.C. Gen. Stat. §7A-289.31 requires that even if a statutory basis for termination exists, the petition must be dismissed if the best interests of the child would be furthered by such action. Although findings and conclusions are required under North Carolina law [N.C. Gen. Stat. §§ 7A-289.30 (e); 7A-289.31], the court order in this case conspicuously omits any finding or conclusion as to why the "best interests" of the minor would not have been served by dismissing the petition and placing the child with the grandmother. (J.A. 5-8) This failure to consider such a placement seems particularly unwarranted considering the historical significance of the extended family within the Afro-American culture. Indeed, as indicated by a recent study,

> At a time when kinship bonds among whites are weakening, the extended family is still one of the most viable institutions for the survival and advancement of black people today. And, one of the key functions performed by the black extended family is the informal adoption or foster care of children by grandparents, aunts, and uncles and other kin . . . Historically, blacks have had to develop their own informal networks for adoption and foster care. While two-thirds of white children born out-of-wedlock are given away for formal adoption, 90

> percent of the black children born out-of-wedlock each year are retained by the extended family and only one-tenth are placed with formal adoption agencies. Hill, *Informal Adoption Among Black Families*, iv (1977).

If counsel had been appointed to represent petitioner, it is reasonable to expect that this important issue would have been clearly presented to the court as a discrete legal issue requiring appropriate findings and conclusions. With the issue properly in focus, the record would – at the very least – not be in its present state of confusion as to why the most drastic available alternative was preferred to maintaining the extended family.[40]

Many of the potential difficulties encountered by unrepresented parents in termination proceedings, and described in Point III, B, *supra*, are illustrated by what

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[40] Appointment of counsel is also essential in order to safeguard the parent's right to appeal. Pursuant to N.C. Gen. Stat. § 7A-289.34 (Cum. Supp. 1979) any party has the right to appeal an adverse ruling in a termination case; however, a party wishing to appeal must give notice of appeal within ten days after the hearing. *Id.* This requirement is jurisdictional and, if not met, will result in the dismissal of an appeal. *See*, N.C. Gen Stat. §1-279 (Cum. Supp. 1979); *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 252 S.E.2d 231 (1979). Without provision of counsel, most parents will fail to understand the importance of an appeal and, doubtless, will fail to give timely notice of their intention to pursue an appeal.

In the case at bench, although not required to do so by statute, the trial court did advise petitioner of her right to appeal, and the possible availability of counsel on appeal from the North Central Legal Assistance Program. (RT 62) The late advice is anomalous in view of the court's patent failure to inform petitioner, prior to trial, of any legal assistance programs where she might have sought representation by counsel.

occurred in the case at bench. Much of the evidence against petitioner was hearsay based upon social welfare records, but these records were never authenticated or qualified as business records exceptions to the hearsay rule. (RT 10-13) The hearing was never bifurcated, resulting in an impermissible combining of the court's adjudicative and dispositional functions. Petitioner was clearly unable to conduct a meaningful cross-examination of the social worker, the only witness who testified against her.[41] Since petitioner was unrepresented by counsel, most of her testimony was delivered in response

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[41] In fact, the trial transcript demonstrates that Ms. Lassiter did not understand the function of cross-examination or the difference between testifying herself and examining a witness. For example,

"The Court: All right. Do you want to ask her any questions?

Ms. Lassiter: About what? About what she –

The Court: About this child.

Ms. Lassiter: Oh, yes.

The Court: All right. Go ahead.

[Ms. Lassiter]: The only thing I know is that when you say –

The Court: I don't want you to testify.

Ms. Lassiter: Okay.

The Court: I want to know whether you want to cross-examine her or ask any questions . . . . .

Ms. Lassiter: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know –

The Court: I am not talking about what you know. I want to know if you want to ask her any questions or not

Ms. Lassiter: About that?"

(RT 19).

to questions from the court. (RT 25-36) The court questioned Ms. Lassiter and her mother as though they were adverse witnesses (RT 23-36, 43-52) and on several occasions displayed impatience or incredulity at their answers.[42]

In *In re Murchinson*, 349 U.S. 133 (1955), the Court stated what has become a fundamental tenet of due process: a fair trial requires not only an absence of actual bias but – of equal importance – the appearance of fairness. Because petitioner in the present case was unrepresented by counsel, the court found it necessary to conduct much of the examination of her and her mother. This intertwining of adversarial and judicial functions vitiated the court's ability to serve as an impartial arbiter, and has been condemned by other courts as inconsistent with fundamental fairness. *Ruiz v. Delgado*, 359 F.2d 718 (1st Cir. 1966); *Lois R. v. Superior Court*, 19 Cal. App.3d 895, 97 Cal.Rptr. 158 (1971). The court appears to have been frustrated by its inability to elucidate the answers it wanted from petitioner and her mother. Whether this actually compromised the court's ability to function as a neutral, judicial officer is a matter of conjecture, but petitioner should not have been placed in the position where the court's impartiality may have been compromised.

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[42] For example, when the court concluded its examination of petitioner, it turned her over to Mr. Odom, counsel for the department of social services, with the statement: "All right, Mr. Odom, see what you can do." (RT 36) When Lucille Lassiter stated that she would raise her right hand to God and swear that she had never told a social worker that her daughter had left her children in a cold house with no heat, the court interjected: "I wish you wouldn't talk like that it scares me to be in the same room with you." (RT 55)

Finally, it must be recognized that without representation by counsel, petitioner lost her right to present testimony on direct examinations. Both petitioner and her mother were subjected to two cross-examinations – one conducted by counsel for the social services department and one by the court. As previously discussed, numerous defenses available to petitioner was unaware of their existence. Finally, since petitioner was totally unskilled at cross-examination, various factual disputes went unresolved. (RT 18, 22-3, 35) In short, the trial testimony in the case at bench vividly attests to the insuperable difficulties confronted by an unrepresented parent in a termination proceeding – difficulties which render the promise of due process to be illusory.

IV.

NEITHER EXPENSE NOR ADMINISTRATIVE INCONVENIENCE CAN JUSTIFY DENIAL OF COURT-APPOINTED COUNSEL FOR INDIGENT PARENTS IN TERMINATION CASES.

A. This Court Has Never Recognized Expense or Adminstrative Inconvenience as a Reason to Deny Counsel to an Indigent Litigant.

The final factors which this Court has scrutinized in determining the scope of due process protections are "the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976). However, this Court has never denied an indigent person representation by counsel because of costs or administrative inconvenience. *See, e.g., Bounds v. Smith*, 430 U.S. 817 (1977); *Ross v. Moffitt*, 417 U.S. 600 (1974); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Douglas v. California*, 372

U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963). As the Court stated in *Bounds v. Smith, supra*, in holding that inmates preparing legal papers must be provided with either adequate law libraries or assistance from persons trained in the law, ". . . the cost of protecting a constitutional right cannot justify its total denial." *Id.* at 825.

The premise underlying the above-cited cases is that provision of counsel is of such fundamental importance to a litigant whose liberty is in jeopardy that expense or administrative inconvenience must be considered of *de minimis* significance in evaluating the applicability of constitutional safeguards. In fact, the expense argument was specifically rejected by this Court in *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970), where this Court stated that neither fiscal nor adminstrative burdens could justify denial of jury trials in criminal cases where the potential maximum sentence was less than six months. Clearly, jury trials in such cases are less fundamental to our constitutional system than the right to counsel in a proceeding where a parent can be permanently deprived of custody of her children. *Compare In re Gault*, 387 U.S. 1 (1967), and *Stanley v. Illinois*, 405 U.S. 645 (1972), *with McKeiver v. Pennsylvania*, 504 U.S. 528 (1971). This is the conclusion reached by several lower courts which have held that neither expense nor inconvenience can justify denial of the right to court-appointed counsel. *Sweeten v. Sneddon*, 324 F.Supp. 1094, 1105 (D. Utah 1971); *Bramlett v. Peterson*, 307 F.Supp. 1311, 1316-17 (M.D. Fla. 1969); *Phillips v. Cole*, 298 F. Supp. 1049, 1053 (N.D. Miss. 1968).

B. The Cost and Administrative Inconvenience of Providing Counsel for Indigent Parents in Termination Cases Would Not Be Great.

Even under the assumption, which this Court has consistently rejected, that costs and administrative inconvenience are relevant factors in determining the applicability of fundamental constitutional rights, there is little reason to believe that the burdens imposed by requiring appointment of counsel would be great. Annexed to this brief as Appendix B is a chart which demonstrates that the right to counsel is already guaranteed for indigent parents in termination proceedings in at least thirty-four states and the District of Columbia.[43] All of the most heavily populated states, which presumably have the greatest number of termination hearings, already guarantee the parent's right to counsel; and it is entirely possible that in those states where the right to counsel is not explicitly guaranteed, counsel is appointed in some or all cases in the exercise of the courts' discretion.

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[43]Two other states, Oregon and Tennessee, may also guarantee the right to counsel, although the situation in those jurisdictions is not entirely clear. *State v. Jamison*, 444 P.2d 15 (Ore. Sup. Ct 1968), contains *dicta* which suggests that the court was finding that the right to counsel was based upon the Constitution as well as Oregon statutes. *Id.* at 17. Although Oregon Stat. § 419.498 does not presently guarantee the right to counsel for parents, this may be because the right to counsel has already been found by the Oregon Supreme Court to emanate from a constitutional source.

Smith v. Edminston, 431 F. Supp. 941 (W.D. Tenn. 1977), holds that parents in dependency and neglect cases possess a constitutional right to representation by counsel. The decision in *Smith* would seem to extend to termination cases, although there is no Tennessee case directly on point.

There do not appear to be any national statistics concerning the annual number of termination proceedings, although there is agreement that the number of termination cases constitutes a small fraction of the total number of abuse, neglect, or dependency proceedings.[44] Review of the county social services records in five counties in North Carolina revealed that in two of the counties termination had been successfully sought in only two cases during a two-year period. [45] In the five county field audit, termination of parental rights was infrequently mentioned in the records, and, "[w]here it had been mentioned, it had not yet happened . . . ."[46] A study of several states by the Children's Defense Fund also indicates that the total number of termination proceedings is not great.[47] The cost of furnishing counsel in the relatively few states where it is not already provided would, therefore, be minimal, particularly in comparison to the cost of furnishing counsel in the hundreds of thousands of criminal cases where this Court has held that the right to counsel is constitutionally guaranteed. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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[44] "While there is some evidence of increased terminations, such laws still are applied in a very small percentage of the cases where children are in state care." Wald, *supra*, 28 Stan. L. Rev. 623, 636 (1976).

[45] Governor's Advocacy Report, *supra*. at 62.

[46] *Id.* at 63.;

[47] It is reported that in 1975 there were 121 terminations of parental rights in Arizona, 67 in South Carolina, and 844 in California. However, the California figures include only those children for whom parental rights were teminated and adoptive placements were made. Children's Defense Fund, *Children Without Homes: An Examination of Public Responsibility to Children in Out-of-Home Care*, Appendix 0 at 256 (1975).

In *Argersinger, supra,* this Court held that an accused in a criminal case may not be denied the assistance of counsel when the defendant suffers deprivation of liberty, no matter how brief. To guarantee counsel to an accused who may be incarcerated for one day, while denying counsel on the basis of cost to a parent who may lose her children forever, would foster the most irrational and indefensible of inequities.

Finally, the administrative burden which would be imposed in those fourteen to sixteen jurisdictions which do not already provide counsel for indigent parents in termination cases as a matter of right would be slight. These states already provide counsel for children in delinquency proceedings. [*In re Gault,* 387 U.S. 1 (1967)] ; and may provide counsel for children or parents in neglect, abuse, or dependency proceedings.[48] The

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[48] North Carolina law, for example, provides:

"In any proceeding in which delinquency is alleged, the judge shall appoint counsel unless counsel is retained for the juvenile." N.C. Gen. Stat. § 7A-584.

"When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a *guardian ad litem* to represent the juvenile." N.C. Gen. Stat. § 7A-586.

"In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to appointed counsel in cases of indigency unless the parent waives the right." N.C. Gen. Stat. § 7A-587.

It is, indeed, ironic that the North Carolina legislature has seen fit to guarantee the right of indigent parents to appointed counsel in abuse, neglect, or dependency proceedings, where the deprivation of parental rights is temporary, but not in termination cases which result in the permanent and total destruction of the parent-child relationship.

[footnote continued]

administrative mechanism for appointment of counsel – whether it be through a public defender system or a panel comprised of private attorneys – will already be functional; and it will be relatively simple to expand the administrative system to include a relatively small number of termination cases.

C. A Decision by this Court Holding that Indigent Parents are Constitutionally Entitled to Appointed Counsel in Termination Cases Does Not Require Provision of Counsel Generally in Civil Cases.

A decision by this Court that indigent parents in termination of parental rights cases are constitutionally entitled to representation by counsel does not mean that attorneys must be furnished to indigent litigants generally in civil proceedings. In civil litigation between private parties, such as divorce cases involving child custody disputes,[49] the government is not a party and does not initiate the proceeding. Hence, there is no institutional inequality of resources and skills between the parties which typifies a proceeding to terminate parental rights. *See, In re Ella B., supra;* Note: *Child Neglect: Due Process for the Parent,* 70 Colum L. Rev. 465, 477 (1970).

For a listing of those jurisdictions which guarantee a right to counsel for indigent parents in abuse, neglect, or dependency cases see Katz, Howe, and McGrath, *Child Neglect Laws in America,* 9 Fam. L. Q. 1, 59 and Table VI at 31-33 (1975).

[49]Such civil litigation between private parties would include step-parent adoptions where one biological parent is seeking to contest an adoption by a step-parent which is being supported by the other biological parent. *See, In the Matter of the Petition of J.O.L.,* 409 A.2d 1073 (D.C. Ct. of App. 1979), *cert. granted,* 49 U.S.L.W. 3207 (10/7/80).

Unlike child custody disputes, termination of parental rights cases are government initiated proceedings in which the parent is charged with wrongdoing, and in which the considerable resources of the state are amassed against the private litigant. *Danforth v. State Dept. of Health and Welfare,* 303 A.2d 794, 799 (Me. Sup. Ct. 1973). In addition, parties who are litigants in civil disputes do not usually face criminal charges based upon the conduct which is the subject of the civil proceeding, an omnipresent possibility in any termination case based upon allegations of abuse or neglect. *See, e.g., State ex rel. Lemaster v. Oakley,* 203 S.E.2d 140, 144 (W. Va. Sup. Ct. of App. 1974).[50] Finally, termination proceedings directly implicate the fundamental, constitutionally protected right to family integrity, a right which this Court has consistently found to be a cornerstone of our societal values and traditions. *See, Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 503-504 (1977). Most civil cases do not impinge upon such fundamental rights; even child custody disputes, which do implicate fundamental parental rights, do not result in the total destruction of the nuclear or extended family inasmuch as custody is usually awarded to one of the parents.

Termination proceedings are perhaps unparalleled in our judicial system. They directly implicate constitutionally protected interests of the highest magnitude. They involve drastic governmental intrusion into the fundamental realm of family privacy. They contain allegations of parental misconduct, generally considered reprehensible by most of our society, and frequently involve the threat of criminal prosectuion. For these reasons, the

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[50] *See,* cases cited in Point II B, *supra.*

constitutionally protected right of indigent parents in termination proceedings to representation by counsel does not require extension of the right to counsel to more traditional forms of civil litigation between private parties.

CONCLUSION

For the above-stated reasons petitioner urges that the judgment and order of the North Carolina Court of Appeals be reversed and the case be remanded with directions to accord petitioner a new hearing at which she shall be provided court-appointed counsel.

Respectfully submitted,

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APPENDIX A

North Carolina Statutes In Effect As of August 31, 1978, the Date of the Termination of Parental Rights Proceeding In This Case:

ARTICLE 24B

§7A-289.22. Legislative intent; construction of Article. – The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict; and to that end this Article should be liberally construed. (1977, c. 879, s. 8.)

§7A-289.23. Jurisdiction. – The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental

rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. A guardian ad litem shall be appointed to represent such minor parent, under the age of 14 years. (1977, c. 879, s. 8.)

§7A-289.24. Who may petition. – A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or

(2) Any person who has been judicially appointed as the guardian of the person of the child; or

(3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

§7A-289.25. Petition. – The petition shall be verified by the petitioner and shall be entitled "In re (*last name of child*) a minor child"; and shall set forth such of the

following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

(1) The name of the child as it appears on the child's birth certificate, the date and place of birth, and the county where the child is presently residing.

(2) The name and address of the petitioner and facts sufficient to identify the petitioner as one entitled to petition under G.S. 7A-289.24.

(3) The name and address of the parents of the child. If the name or address of one or both parents is unknown to the petitioner, the petitioner shall set forth with particularity the petitioner's efforts to ascertain the identity or whereabouts of the parent or parents. Such information may be contained in an affidavit attached to the petition and incorporated therein by reference.

(4) The name and address of any person appointed as guardian of the person of the child pursuant to the provisions of Article 1 of Chapter 33 of the General Statutes, or of G.S. 7A-286(7).

(5) The name and address of any person or agency to whom custody of the child has been given by a court of this or any other state; and a copy of such custody order shall be attached to the petition.

(6) Facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist. (1977, c. 879, s. 8.)

§7A-289.26. Preliminary hearing; unknown parent. – (a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not

known to the petitioner, the court shall within 10 days from the date of filing of the petition, or during the next term of court in the county where the petition is filed if there is no court in said county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the child concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and such parent shall be summoned to appear in accordance with G.S. 7A-289.27.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing; but the court may cause summons to be issued to any person directing him to appear and testify.

(d) If the court is unable to ascertain the name or identity of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the child to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designate the court in which the petition is pending;

(2) Be directed to "the father (mother)(father and mother) of a male(female) child born on or about _____ in _____
(date)
County, _____
(City) (State)
respondent";

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);

(4) State that a petition seeking to terminate the parental rights of the respondent has been filed;

(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice, and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j)(9)(c); and

(6) State that the respondent's parental rights to the child will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

(e) The court shall issue the order required by G.S. 7A-289.26(b) and (d) within 30 days from the date of the preliminary hearing unless the court shall determine that additional time for investigation is required.

(f) Upon the failure of the parent served by publication pursuant to G.S. 7A-289.26(d) to answer the petition within the time prescribed, the court shall issue an order terminating all parental rights of the unknown parent. (1977, c. 879, s. 8.)

§7A-289.27. **Issuance of summons.** – Except as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued, directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the child;

(2) Any person who has been judicially appointed as guardian of the person of the child;

(3) The custodian of the child appointed by a court of competent jurisdiction;

(4) Any county department of social services or licensed child-placing agency to whom a child has been released by one parent pursuant to G.S. 48-9(a)(1); and

(5) The child, if he or she is 12 years of age or older at the time the petition is filed.

Provided, no summons need be directed to or served upon any parent who has previously surrendered the child to a county department of social services or licensed child-placing agency, nor to any parent who has consented to the adoption of the child by the petitioner. The summons shall notify the respondents to file written answer within 30 days after service of the summons and petition and that if the respondents fail to answer, the petitioner will apply to the court for the relief prayed for in the petition. Service of the summons shall be completed as provided under the procedures established by

G.S. 1A-1, Rule 4(j); but the parent of the child shall not be deemed to be under disability even though such parent is a minor. (1977, c. 879, s. 8.)

§7A-289.28. Failure of respondents to answer. – Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within 30 days from the date of first publication if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition. (1977, c. 879, s. 8)

§7A-289.29. Answer of respondents. – (a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney.

(b) If an answer denies any material allegation of the petition, the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at

the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8.)

§7A-289.30. Adjudicatory hearing on termination. – (a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the cout may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based upon a preponderance of the evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8.)

§7A-289.31. Disposition. – (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

(b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition, making appropriate findings of fact and conclusions.

(d) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8.)

§7A-289.32. Grounds for terminating parental rights. – The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare.

(2) The parent has physically abused or neglected the child. The child shall be deemed to be physically abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights;

a. Established paternity judicially or by affidavit; or

b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or

c. Legitimated the child by marriage to the mother of the child; or

d. Provided substantial financial support or consistent care with respect to the child and mother. (1977, c. 879, s. 8.)

§7A-289.33. Effects of termination order. – An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

(1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the

child in the custody of the petitioner, or some other suitable person, or in the custody of the Department of Social Services or licensed child-placing agency, as may appear to be in the best interest of the child. (1977, c, 879, s. 8.)

§7A-289.34. Appeals; modification of order after affirmation. – Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. Upon the affirmation of the order of adjudication or disposition of the district court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of such an appeal, the district court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interest of the child to reflect any adjustment made by the child or change to reflect any adjustment made by the child or change in circumstances during the period of time the case on appeal was pending, provided that if such modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why said modifying order should be vacated or altered. (1977, c. 879, s. 8.)

§7A-300. Expenses paid from State funds. – (a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly. The Administrative

Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;

(2) Salaries and expenses of superior court judges, solicitors, assistant solicitors, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter.

(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;

(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;

(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;

(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;

(7) Compensation and allowances of court reporters;

(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;

(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the solicitor.

(10) Transcript of the evidence and trial court charge furnished the solicitor when a criminal action is appealed to the appellate division;

(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and

(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

§7A-450. Indigency; definition; entitlement; determination. – (a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this subchapter.

(b) Whenever a person, under the standards and procedures set out in this subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation. (1969, c. 1013, s. 1.)

§7A-451. Scope of entitlement. – (a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollars ($500.00) fine;

(2) A hearing on a petition for a writ of habeas corpus under chapter 17 of the General Statutes;

(3) A post-conviction proceeding under chapter 15 of the General Statutes;

(4) A hearing for revocation of probation, if counsel was provided at trial or if confinement of more than six months is possible as a result of the hearing;

(5) A hearing in which extradition to another state is sought;

(6) A proceeding for judicial hospitalization under chapter 122, article 11 (Mentally Ill Criminals), of the General Statutes;

(7) A civil arrest and bail proceeding under chapter 1, article 34, of the General Statutes; and

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible.

(b) In each of the actions and proceedings enumerated in subsection (1) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation;

(2) A pretrial identification procedure at which the presence of the indigent is required;

(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;

(4) A preliminary hearing;

(5) Trial and sentencing; and

(6) Review of any judgment or decree pursuant to G.S. 7A-27, G.S. 7A-30(1), G.S. 7A-30(2), and G.S. 15-222. (1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 2; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 649, s. 4; c. 766, s. 2.)

APPENDIX B

CHART DEMONSTRATING WHICH STATES PROVIDE RIGHT TO COUNSEL FOR INDIGENT PARENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

STATE	RIGHT TO COUNSEL PROVIDED BY STATUTE	RIGHT TO COUNSEL PROVIDED BY COURT DECISION	RIGHT TO COUNSEL NOT GUARANTEED	UNCLEAR
ALABAMA	X			
ALASKA	X			
ARIZONA	X			
ARKANSAS			X	
CALIFORNIA	X			
COLORADO	X			
CONNECTICUT	X			
DELAWARE			X	
D.C.	X			
FLORIDA			X	

STATE	RIGHT TO COUNSEL PROVIDED BY STATUTE	RIGHT TO COUNSEL PROVIDED BY COURT DECISION	RIGHT TO COUNSEL NOT GUARANTEED	UNCLEAR
GEORGIA			X	
HAWAII			X	
IDAHO	X			
ILLINOIS	X			
INDIANA	X			
IOWA	X			
KANSAS	X			
KENTUCKY	X			
LOUISIANA	X			
MAINE	X	X		

STATE	RIGHT TO COUNSEL PROVIDED BY STATUTE	RIGHT TO COUNSEL PROVIDED BY COURT DECISION	RIGHT TO COUNSEL NOT GUARANTEED	UNCLEAR
MARYLAND	X			
MASSACHUSETTS	X			
MICHIGAN	X			
MINNESOTA	X			
MISSISSIPPI	X			
MISSOURI	X			
MONTANA	X			
NEBRASKA	X	X		
NEVADA	X			
NEW HAMPSHIRE	X			

STATE	RIGHT TO COUNSEL PROVIDED BY STATUTE	RIGHT TO COUNSEL PROVIDED BY COURT DECISION	RIGHT TO COUNSEL NOT GUARANTEED	UNCLEAR
NEW JERSEY	X	X		
NEW MEXICO			X	
NEW YORK	X			
NORTH CAROLINA			X	
NORTH DAKOTA	X			
OHIO	X			
OKLAHOMA	X	X		
OREGON				X
PENNSYLVANIA		X		
RHODE ISLAND	X			

STATE	RIGHT TO COUNSEL PROVIDED BY STATUTE	RIGHT TO COUNSEL PROVIDED BY COURT DECISION	RIGHT TO COUNSEL NOT GUARANTEED	UNCLEAR
SOUTH CAROLINA			X	
SOUTH DAKOTA			X	
TENNESSEE				X
TEXAS			X	
UTAH	X			
VERMONT			X	
VIRGINIA			X	
WASHINGTON	X			
WEST VIRGINIA		X		
WISCONSIN	X			
WYOMING			X	

STATUTORY AND CASE LAW AUTHORITIES FOR APPENDIX B AND EXPLANATORY NOTES

ALABAMA	Ala. R. Juv. P. 15 §12-15-63 (Supp. 1966)
ALASKA	Alaska Rules of Court Procedure and Administration Children's Rules Rule 15 (1977)
ARIZONA	Ariz. Rev. Stat. Ann. §8-225 (Supp. 1980)
ARKANSAS	Ark. Stat. Ann. §45-413
CALIFORNIA	Cal. Civ. Code Ann. §237.5 (Supp. 1980) (West)
COLORADO	Colo. Rev. Stat. §19-11-103
CONNECTICUT	Conn. Gen. Stat. Ann. Chapter 815-t, §46b-136 (1979) (West)
DELAWARE	Del. Code Ann. tit. 13, §§1101-1112 (Supp. 1978), or Del. Code Ann. tit. 10, §§901 *et seq.*
D.C.	D.C. Code Encycl. §16-2304(b)(1) (Supp. 1978-1979) (West)
FLORIDA	Fla. Stat. Ann. §§39.001 to 39.516 (Supp. 1980) (West)
GEORGIA	GA. Code Ann. §24A-32
HAWAII	Haw. Rev. Stat. §571-62
IDAHO	Idaho Code §16-2009

ILLINOIS	Ill. Rev. Stat. ch. 37, §701-20
INDIANA	Ind. Code Ann. §31-6-7-2(b) (West)
IOWA	Iowa Code Ann. §232.89 (West)
KANSAS	Kan. Stat. Ann. §38.820 (Supp. 1979)
KENTUCKY	Ky. Rev. Stat. §199.600(7)
LOUISIANA	La. Rev. Stat. Ann. §13:1602(c) (Supp. 1974) (West)
MAINE	Me. Rev. Stat. Ann. tit. 22, §4005(2) (Supp. 1979); *Danforth v. State Dept. of Health and Welfare,* 303 A.2d 794 (Me. Sup. Ct. 1973)
MARYLAND	Md. Cts. & Jud. Proc. Code Ann. §3-821
MASSACHUSETTS	Mass. Gen. Laws Ann. ch. 119, §29 (West)
MICHIGAN	Mich. Stat. Ann. JCR §6.1 (Supp. 1980)
MINNESOTA	Minn. Stat. Ann. §260.155 (West)
MISSISSIPPI	Miss. Code Ann. §43-21-17 (1972)
MISSOURI	Mo. Ann. Stat. §211.562 (Supp. 1980) (Vernon)
MONTANA	Mont. Rev. Codes Ann. §61-320 (Supp. 1977)
NEBRASKA	Neb. Rev. Stat. 1943 §43-205.6 (1978); *In re Friesz,* 208 N.W.2d 259 (Neb. Sup. Ct. 1973)
NEVADA	Nev. Rev. Stat. §128.100

NEW HAMPSHIRE	N.H. Rev. Stat. Ann. §170-C:10
NEW JERSEY	N.J. Stat. Ann. §9:6-8.43 (Supp. 1980) (West); *Crist v. Div. of Youth and Family Services,* 320 A.2d 203 (N.J. Super. Ct. 1974)
NEW MEXICO	N.M. Stat. Ann. §§13-14-1 to 13-14-4 (Supp. 1976) and §§13-14A-1 to 13-14A-19 (Supp. 1976) or §22-2-23 (Supp. 1975)
NEW YORK	N.Y. Soc. Serv. Law §384-a (Supp. 1979) (McKinney)
NORTH CAROLINA	N.C. Gen. Stat. §§7A-289.22 to 7A-289.34 (Supp. 1979)
NORTH DAKOTA	N.D. Cent. Code §27-20-26
OHIO	Ohio Rev. Code Ann. §2151.352, Rules of Juvenile Procedure, Rule 4
OKLAHOMA	Okla. Stat. Ann. tit. 10, §1109 (West) *Matter of Chad S.,* 580 P.2d 983 (Okla. Sup. Ct. 1978)
OREGON	Ore. Rev. Stat. §419.498 *State v. Jamison,* 444 P.2d 15 (Ore. Sup. Ct. 1968) (Not clear if *Jamison* provides constitutional or statutory right to counsel. Oregon statute §419.498 does not provide right to counsel for parent)
PENNSYLVANIA	*In re Adoption of R.I.,* 455 Pa. 29, 312 A.2d 601 (1973)

RHODE ISLAND	R.I. Gen. Laws §14-1-31 (1956)
SOUTH CAROLINA	S.C. Code Ann. §§31-60 to 31-65 (Supp. 1975); S.C. Code Ann. §15-1095.14 (Supp. 1975) (provides counsel to indigent parents in delinquent, neglected and abandoned cases)
SOUTH DAKOTA	S.D. Comp. Laws Ann. §§25-5, 25-5A, 26-8
TENNESSEE	*Smith v. Edmiston,* 431 F.Supp. 941 (1977) (Holds that right to counsel for indigent parent is guaranteed in dependency and neglect proceedings. Unclear if this ruling applies to termination of parental rights proceedings)
TEXAS	Tex. Fam. Code Ann. §§15.01 to 15.07 (Supp. 1980)
UTAH	Utah Code Ann. §55-10-96
VERMONT	Vt. Stat. Ann. tit. 33, §653 (Supp. 1980)
VIRGINIA	Va. Code Ann. Art. 3 §§16.1-158 to 16.1-193 (1980)
WASHINGTON	Wash. Rev. Code Ann. §13.34.090 (Supp. 1979)
WEST VIRGINIA	*State ex rel. Lemaster v. Oakley,* 203 S.E.2d 140 (W. Va. Sup. Ct. of App. 1974) *United States of America ex rel. Reed v. Tinder,* Civil Action No. 75-0454 (D. W. Va. 1975)

WISCONSIN	Wis. Stat. Ann. §48.42(4)(c) (Supp. 1980) (West)
WYOMING	Wyo. Stat. Ann. §§14-53 to 14-58

No. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR RESPONDENT

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Respondent.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

On April 10, 1978, Bonnie Cramer, a social worker with the Durham County, North Carolina, Department of Social Services, Respondent, filed a Petition in the Juvenile Court seeking the termination of parental rights of Abby Gail Lassiter to the minor, William L. Lassiter. This Petition, along with a Summons, was served on Ms. Lassiter, personally, in Women's Prison, Raleigh, North Carolina on April 12, 1978. She made no response within the time prescribed in the Summons, and as

a result of this default, the Petition was set for evidentiary hearing as required by N.C.G.S. §7A-289.28 for June 13, 1978. Ms. Lassiter was served with a Notice of this hearing by registered mail on May 28, 1978. Because this hearing date conflicted with a statewide judicial conference, it was rescheduled for August 31, 1978, notice of which was served on Ms. Lassiter by registered mail on August 11, 1978. (Joint Appendix, 16).

Prior to the August 31, 1978 hearing, the attorney for the department requested that the presiding Judge call officials at Women's Prison in Raleigh, and direct that Ms. Lassiter be brought to Durham for the hearing. (Joint Appendix, 21). As a result of the Notice of Hearing and the request of counsel for the department, Ms. Lassiter was brought in custody from the Women's Prison to the hearing. (Joint Appendix, 18).

Prior to the taking of testimony, the Trial Judge inquired of Ms. Lassiter as to whether or not she was going to have an attorney. Ms. Lassiter made, in effect, a motion to continue the hearing, stating that she would like more time to talk with her lawyer. The Court noted that she had been served properly with the Summons and Petition, had failed to respond as directed by the Summons, had been served with Notice of Hearing on the Petition two separate times, and had conferred with an attorney with respect to her criminal conviction. However, she had not, mentioned to her attorney that this action had been brought against her or that the hearing had been scheduled. In view of these circumstances, the Court concluded that Ms. Lassiter had had ample opportunity to seek legal counseling and ordered that the hearing proceed. (Joint Appendix, 16). At no time during the entire hearing did Ms. Lassiter ever inform the Court that she could not afford counsel, nor did she ever explicitly or implicitly ask that he appoint an attorney to represent her. (Joint Appendix, 16). (In fact, the first occasion the Trial Judge had to consider Ms. Lassiter's indigency was on the 21st day of November, 1978 when she, through counsel, filed an Affidavit of Indigency asking the Court to allow her to prosecute her appeal *in forma pauperis*. Even then, there was no request for the Court to appoint an attorney to assist her in perfecting her appeal. [Joint Appendix, 13]).

The evidence adduced at the hearing from the social worker, the Petitioner, and Petitioner's mother substantially proved the allegations in the Petition and the Court entered an Order terminating the parental rights of Petitioner as being in the best interests of the minor.

Petitioner immediately thereafter contacted the North Central Legal Assistance Program in Durham, and the attorneys in that agency perfected her appeal, assigning as the sole Assignment of Error the failure of the Trial Judge to appoint an attorney to represent her. (Joint Appendix, 15). The question presented to the North Carolina Court of Appeals was whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution required that the Trial Judge appoint an attorney to represent her at state expense and without legislative authorization, before proceeding with a hearing on the Petition to terminate her parental rights. (Joint Appendix, 22).

The North Carolina Court of Appeals, in considering this sole question, followed the principles of due process previously outlined by this Court, and ruled that Ms. Lassiter had been given ample notice and opportunity to be heard and was not entitled to a Court appointed attorney at state expense absent legislative enactment authorizing such. *In the Matter of Lassiter,* 43 N.C. App. 525, 259 S.E. 2d. 336 (1979). (Joint Appendix, 21-23). On January 17, 1980, the North Carolina Supreme Court, without opinion, denied her Petition for Discretionary Review, *In the Matter of Lassiter,* 299 N.C. 120, 262 S.E. 2d. 6 (1980). (Joint Appendix, 28).

Thereafter, Ms. Lassiter petitioned this Court for a Writ of Certiorari to review the decision of the North Carolina Court of Appeals. The writ was granted on October 6, 1980. (Joint Appendix, 31).

SUMMARY OF THE ARGUMENT

The writ of certiorari was granted to review a constitutional question that was not raised properly in the Trial Court. Petitioner assigned as error to the North Carolina Court of Appeals the Trial Court's failure to appoint an attorney to represent her because she was indigent. At no time during the trial proceedings, however, did the Petitioner raise the question of appointment of counsel or offer evidence of her indigency. In fact, she focused the court's attention away from consideration of those factors, by requesting a delay in the proceedings to confer with her attorney who was representing her in a proceeding for post-conviction relief after her conviction for second degree murder. Once the Trial Judge learned that she had failed even to mention the instant proceeding to the attorney, though she had been conferring with him over the preceeding four months, he denied her request for a delay. The writ should be dismissed as having been granted improvidently because of the Petitioner's failure to raise properly the constitutional question in the Trial Court.

The Court "has looked to the fundamental nature of the original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States." *Gideon v. Wainwright,* 372 U.S. 335 (1963). Virtually every right specifically enumerated in the Bill of Rights has been found so to be. Additionally, many other rights not specifically spelled out have been deemed fundamental as falling within the "penumbras" of, or "emanations" from, guarantees in the Bill of Rights. *Griswold v. Connecticut,* 381 U.S. 479 (1964). Clearly, elements of marriage, family, and the parent-child relationship are considered to be in this category.

The right to counsel in a criminal action is fundamental, *Powell v. Alabama,* 287 U.S. 45 (1932). The logical extension of that right requires the appointment of counsel for the indigent in a criminal proceeding to overcome the inherent imbalance of resources between the State and the individual in a criminal action and allows the Defendant to stand equal before the law. *Gideon v. Wainwright, supra,* at 344. The right to counsel is fundamental in a criminal action specifically because it has been

spelled out in the constitution. The Court has been very careful to avoid extending the right to appointed counsel to cases not infringing on the individual's own personal freedom. *Argersinger v. Hamlin,* 407 U.S. 25 (1972). This present action does not, directly or indirectly, infringe on the Petitioner's own individual personal freedom and is, therefore, not an appropriate case for the extension of the right to court appointed counsel.

At a minimum, the Due Process Clause requires that an individual be given notice and an opportunity to be heard, *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950), at a "meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545 (1965). The many decisions of this Court defining the parameters of those terms have not extended their meaning to include appointment of counsel for the indigent in every action affecting a liberty or property interest, whether or not such interest be deemed fundamental. To require the appointment of counsel in this proceeding because Petitioner's interest in her child might be deemed fundamental would require the immediate extension of this right to the indigent in any action involving one of the many interest previously deemed fundamental by this Court. *See Boddie v. Connecticut,* 401 U.S. 371 (1971).

The fact that more than half of the states presently provide for appointed counsel in similar proceedings either by legislative enactment or decrees of lower court does not mean that appointment of counsel is *required* by the Due Process Clause of the Fourteenth Amendment. The creation and extension of such a right is within the legislative prerogative and should be left to the states. The North Carolina legislature has considered bills which would create such a right, but has been unwilling to adopt them. Still, the legislatures of North Carolina and the other states are the proper forum for consideration of this issue.

The tripartite balancing test enacted in *Mathews v. Eldridge,* 424 U.S. 319 (1976), has been offered by the Petitioner as the guide to be used by the Court in considering the merits of her claim. That balancing approach is inapposite to the case at bar, except by rather tenuous analogy. It was created over a long period of time by the Court in review of many administrative and *ex parte* quasi-judicial decisions that were challenged on Due

Process grounds because they affected adversely a liberty or property interest without giving the individual notice and opportunity to be heard. The present action was not an administrative or *ex parte* judicial decision. It was a judicial proceeding resulting in a termination of Petitioner's parental rights only after a full hearing at which she was present, testified, and cross-examined witnesses.

Even the application of the *Mathews* balancing principle does not require appointment of counsel in this case. The Petitioner's interest in her child, presumed to be fundamental while he was in her care, custody, and control, became qualified or conditional once he was removed from her custody because of neglect, *see, Morrissey v. Brewer,* 408 U.S. 471 (1972), and as a result of her total failure to indicate any meaningful concern or care for his welfare, devolved to a purely biological relationship devoid of any meaningful association with her child. *See Smith v. Organization of Foster Families,* 431 U.S. 816 (1977). That interest, when balanced against the interest of the child in a permanent plan of care separate and apart from her, becomes something less than fundamental and requires less Due Process protection.

There is little risk of erroneous termination of parental rights under the North Carolina statutory scheme. The statute strikes a balance between the interest of the child and his permanent plan of care in the majority of cases in which the parent expresses no interest, and those cases where the parents do express an interest. It is a judicial proceeding rather than an administrative one, requiring full notice and opportunity for hearing, and requiring a hearing on the merits of the Petition, even when the parent defaults. What little statistical information that exists indicates that in the vast majority of cases the assistance of a lawyer for the parent makes very little difference in the final outcome. Rights are terminated in approximately 95% of cases where the parent is represented. Petitioner's total lack of interest in her child is clear from a reading of the record, and the Trial Court's finding and conclusion that termination was in the best interest of the child have not been challenged on appeal.

The government's primary interest in these proceedings is to insure that those children needing permanent plans of care apart from their parents can realize that need with a minimum of difficulty, while allowing a full opportunity for those parents maintaining an interest in their children to make such interest known. While potential costs of appointed counsel in these proceedings are low by comparison to criminal actions, an extension of a right to appointed counsel to this family interest that necessarily would require extension of the right to an indigent in any other action involving a fundamental right, would be very expensive. Since there is some indication that the presence of an attorney makes very little differences in these proceedings, appointment of counsel would serve only to drive up administrative and judicial costs, while delaying for a considerable period of time the realization of the child's permanent plan of care. Thus, the present statutory scheme is a reasonable and rational effort to balance the interests of the child, the parent, and the government, while affording all interest parties due process.

The Due Process Clause of the Fourteenth Amendment requires that in an action affecting an individual's liberty or property interest other than his personal freedom from restraint, that he be given notice and an opportunity to be heard. There is no question that Petitioner was afforded this due process when she was served personally, and in spite of her failure to respond to the Petition, was present and testified at the hearing. The Constitution requires no more, and the lower court's decision to that effect should be affirmed.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS HAVING BEEN GRANTED IMPROVIDENTLY IN VIEW OF THE FACTUAL CIRCUMSTANCES OF THIS CASE.

The Petitioner, Ms. Lassiter, does not challenge that in this civil action, brought by the Durham County Department of Social Services (the Department), that she was afforded both notice and opportunity to be heard as required by the Due Pro-

cess Clause of the Fourteenth Amendment. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950); *Armstrong v. Manzo*, 380 U.S. 545 (1965). *See*, Joint Appendix 5-6, 16, 21-22; Brief for Petitioner 3. What she seeks, however, is to have the Court forge an additional procedural requirement out of the Due Process Clause: that of court-appointed counsel at state expense in an action not affecting her personal freedom. She does so on the theory that her right as the biological mother of William Lassiter is such a fundamental liberty interest (much more so than the other liberty interest identified by this Court in *Mullane* and *Armstrong* as being protected adequately by notice and opportunity to be heard), that in a civil action affecting that right, the trial court must appoint an attorney to represent her to ensure that this special liberty interest is protected. In this proceeding, the Trial Court was not presented with this theory, nor was it confronted with any request for appointed counsel or evidence of indigency.

At the outset of the hearing on August 31, 1978, the trial judge questioned Ms. Lassiter about representation by counsel. She, in effect, made a motion for the hearing to be delayed to allow an opportunity to talk with her attorney about this proceeding. In considering this request, the trial judge reviewed when Ms. Lassiter was served with the Summons and Petition, and discovered that she had been served more than four (4) months previous to the hearing. He also discovered that she had been served with two separate notices of hearing. Ms. Lassiter then informed him that she had been consulting with her attorney throughout that four-month period, but never had mentioned to him that she was involved in an action affecting the very heart of her relationship with her son. Considering this only in the context of her request for a delay, the judge, in his discretion, ruled that she had had ample time to seek counseling, especially when she had been conferring with an attorney throughout, and denied her request. Joint Appendix 16.

On appeal to the North Carolina Court of Appeals, Ms. Lassiter assigned, however, as her sole assignment of error, the judge's failure to *appoint* an attorney for her. Joint Appendix 15. There is nothing in the record before the Court to indicate

that this question was before the Trial Court. She never asked that he appoint a lawyer for her, nor did she at any time during the hearing inform the Court, or offer any evidence, that she was indigent. The question of whether he should assign counsel for her was not raised until she, in an Affidavit, asked the Trial Court to allow her to prosecute her appeal *in forma pauperis* on November 21, 1978, more than two months after the hearing. This was also the first time the court was informed of her indigency. Joint Appendix 13. Clearly, had she asked for appointed counsel and offered evidence of her indigency during the discussion regarding counsel and the Trial Court denied her request, (consistent with the North Carolina statutory scheme regarding appointment of counsel for indigents) then her question as to whether or not such appointment is required by the Fourteenth Amendment would have been raised properly.

In the hearing on August 31, 1978, the judge was led away from any question of appointment of counsel or determination of indigency by Ms. Lassiter's request for additional time to talk with her attorney, who was already conferring with her on another matter, and to whom she had failed to mention this action. This, coupled with the fact that she had been given notice of the proceeding and brought to the hearing, along with a total lack of legislative or binding case law authority to appoint counsel in this type of proceeding, prevented the constitutional question from being raised properly. At most, the judge may have erred by not allowing her request for a delay, but there was no exception taken to this possible error. Ms. Lassiter was in no way precluded from assigning this action as error to the Court of Appeals, but failure to do so constituted a waiver under the North Carolina Rules of Appellate Procedure.[1] The record to the North Carolina Court of Appeals, especially the Narrative of Testimony, Joint Appendix 16, provided ample opportunity to raise that question.

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[1]Rule 10 of the North Carolina Rules of Appellate Procedure, subsection (c) states: "The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exception . . . Exceptions not thus listed will be deemed abandoned."

Clearly, under this set of circumstances, before she could charge the judge with error in failing to appoint counsel, he should have been confronted with not only a request for such, but also given evidence that it was appropriate in Ms. Lassiter's situation because of her indigency. Her request, however, was for additional time to talk with her attorney about the pending matter. Mr. Loflin's Affidavit reflects that he would not have undertaken to represent her. Joint Appendix 11. Had she at least mentioned it to him however, she would have had a better basis for requesting a delay. Sheer speculation only allows for consideration of all the possible alternative events that may have occurred had she only mentioned the pending action and hearing to Mr. Loflin. The least he would have said is "I don't want to talk about that". He might have referred her to Legal Aid himself. He may have even informed her of "a constitutional right to appointed counsel" and instructed her to request counsel at the hearing. Any one of these different circumstances might have led to a more favorable consideration of her request for delay and allowed her time to go to Legal Aid. Nothing in the record indicates that the North Central Legal Assistance Program in Durham would have refused her representation at the hearing had they been asked. They immediately responded to her request for aid on appeal. It was Ms. Lassiter's total dereliction in failing to mention to Mr. Loflin in all her communication with him that this action was pending that the judge found to be "without just cause." Joint Appendix 6.

Under the circumstances as set forth above, the question of the court's error to appoint counsel as a requirement of Fourteenth Amendment Due Process was not raised properly and the writ of certiorari issued to review such error was therefore, improvidently granted and should be dismissed. Her failure to take exception to any other possible errors in her Record on Appeal, and assign them as errors to the North Carolina Court of Appeals, as provided for by the Rules of Appellate Procedure, is an adequate and independent state grounds for sustaining the court's termination of her rights.

II. WHETHER A RIGHT IS FUNDAMENTAL OR NOT IS NOT DETERMINATIVE OF WHETHER COUNSEL SHOULD BE APPOINTED AT STATE EXPENSE AS A REQUIREMENT OF FOURTEENTH AMENDMENT DUE PROCESS.

A. Those Rights Explicitly or Implicitly Guaranteed By The Constitution's Bill of Rights Are Fundamental And Therefore Binding on The States By Virtue of the Fourteenth Amendment.

Whether a right is to be considered fundamental is determined, not by balancing relative interests, but by whether it is explicitly or implicitly provided for in the Constitution. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 35 (1972). The rights guaranteed by the first eight Amendments to the Constitution are protected from unnecessary state infringment by the Due Process Clause of the Fourteenth Amendment. Mr. Justice Black, speaking for the Court in *Gideon v. Wainwright,* 372 U.S. 335 (1963) pointed out that:

> "In many cases . . . this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association and petition for redress of grievances." (citations omitted). *Id.,* at 341.

In *Griswold v. Connecticut,* 381 U.S. 479 (1964) the Court, per Mr. Justice Douglas, pointed out that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance." *Id.,* at 484. It is in this fashion that the institutions of marriage and the family, not specifically mentioned in the Bill of Rights, have

sought, and found, protection under the Fourteenth Amendment[2] and though nowhere spelled out in the Bill of Rights, may ordinarily be considered fundamental. *Cf,* Part V, B-C, *infra,* (parent's interest may become qualified or conditional).

B. The Right To Appointed Counsel For The Indigent Is Required By The Due Process Clause Of The Fourteenth Amendment Only When The Liberty Interest Being Affected Is The Individual's Own Actual Physical Liberty.

The Sixth Amendment to the United States Constitution specifies that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In a series of cases beginning with *Powell v. Alabama,* 287 U.S. 45 (1932) this Court has held that the fundamental right guaranteed by this amendment to the criminal defendant is preserved to him in state prosecutions by the Due Process Clause of the Fourteenth Amendment. For the first time in that case, the Court imposed on the Trial Court the obligation to appoint counsel if the defendant could not afford to hire counsel. In *Powell,* the liberty interest was the right to life itself since the defendants had been sentenced to death, and the principle laid down in *Powell* was for years, held to apply only in capital cases.

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[2]*Griswold* dealt with the sanctity of the marital relationship. Earlier cases defined the parameters of the right of the parents to educate their children. *Pierce v. Society of Sister,* 268 U.S. 510 (1925), *Meyer v. Nebraska,* 262 U.S. 390 (1923). Others have recognized the need to insulate the family's right to indoctrinate children in a religion from unnecessary state control. *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Wisconsin v. Yoder,* 406 U.S. 205 (1972). The right to have children, *Skinner v. Oklahoma,* 316 U.S. 535 (1942) and to keep them, *Stanley v. Illinois,* 405 U.S. 645 (1971) have also been guaranteed freedom from unnecessary state infringement. *Loving v. Virginia,* 388 U.S. 1 (1967) guaranteed the right of individuals to marry.

In later cases, the Court has been confronted with questions of whether sentences resulting from less than capital offenses required extension of the doctrine of *Powell. Betts v. Brady,* 316 U.S. 455 (1942), holding that the right to appointment of counsel is not fundamental, refused to do so. Twenty years later, the Court in *Gideon v. Wainwright,* 372 U.S. 335 (1962), overruled the holding of *Betts,* stating "that in our adversary system of criminal justice, *any person* haled into Court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.,* at 344, (emphasis mine). Finally, *Argersinger v. Hamlin,* 407 U.S. 25 (1972), while recognizing that *Powell* and *Gideon* involved felonies, held that the right to appointed counsel, firmly established in those cases, was applicable to any criminal prosecution where imprisonment could result. *Accord, Scott v. Illinois,* 440 U.S. 367 (1979). The Court refused to consider whether the Sixth Amendment would require appointment of counsel for crimes where the conviction would not result in imprisonment; saying:

> "How crimes should be classified is largely a state matter. The fact that traffic charges technically fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class where *imprisonment* actually occurs.
>
> "But in those that end up in the *actual deprivation* of a person's liberty, the accused will received the benefit of the 'guiding hand of counsel' so necessary when one's liberty is in jeopardy." *Id.,* at 38-40 (emphasis added.)

No one would question seriously that in this line of cases, beginning with *Powell,* the liberty interest held to require the appointment of counsel as an element of Fourteenth Amendment Due Process is that highly personal freedom from physical restraint. Mere freedom from the negative aspects or stigma of a criminal conviction is not sufficient enough (though these can have a substantial impact on other types of liberty or property interest, *see Argersinger v. Hamlin, supra,* at 48, n. 11, (Concurring Opinion of Mr. Justice Powell), to warrant appointment of

counsel. It is the danger of the loss of one's personal freedom that triggers the due process protection of appointed counsel.

It is this sense of value with regard to one's personal freedom that has led to the extension of the right to appointed counsel to other actions affecting the individual's personal freedom. In *In re Gault,* 387 U.S. 1 (1967), the potential commitment of a juvenile delinquent to a state training school was the basis on which the court held that counsel must be appointed to the indigent juvenile in a delinquency proceeding. *Id.*, at 57. Similarly, it was the potential of commitment to an institution for an indeterminate term from one day to life that required appointed counsel in a hearing on such committment of a mentally ill sex-offender in *Specht v. Patterson,* 386 U.S. 605 (1967).

Important to this discussion of appointed counsel is the recognition that even in some cases involving deprivation of personal, individual liberty, this Court has refused to extend, wholesale, the idea that appointed counsel is always required by the Fourteenth Amendment. In *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), for instance, the Court held that appointment of counsel in a probation revocation hearing should be determined on a case by case basis, because the probationer's liberty had become conditional subsequent to his conviction. *See also Morrissey v. Brewer,* 408 U.S. 471 (1972).

The appointment of counsel in criminal actions at state expense is the logical extension of the guarantee of the right to counsel specified in the Sixth Amendment. The right to counsel is fundamental precisely because *it is* specifically spelled out. The right to appointed counsel for the indigent is guaranteed to minimize the imbalance of resources between the state and the individual inherent in a criminal proceeding. "That government hires lawyers to prosecute, and defendants who have the money hire lawyers to defend are the strongest indication of the widespread belief that lawyers *in criminal court* are necessities . . ." *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). (emphasis added). In holding that appointment of counsel for the indigent criminal defendant is required by the Constitution to

preserve to him this fundamental guarantee, and ensure that he "stands equal before the law" Mr. Justice Black stated:

> "Not only these precedents, but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one *charged with crime* to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Id.*, at 344, (emphasis added).

While the Court has moved away from strict labeling of actions as civil or criminal, its purpose in doing so is to reach to the heart of an action, and determine if appointment of counsel will benefit the individual who is subject to deprivation of actual liberty, not any other liberty interests. *See In re Gault, supra; Specht v. Patterson, supra.* Utilizing this process of analysis in examining this action to determine if appointment of counsel is required, the logical conclusion is that it is not.

Whether it be called civil or criminal, *see, In re Lassiter,* 43 N.C. App. 525, 259 S.E. 2d. 336 (1979); Joint Appendix 21-23, this action to terminate Ms. Lassiter's parental right to her son did not in any way pose a threat to her own individual personal liberty. The question of whether or not parents whose rights are sought to be terminated pursuant to N.C.G.S. §7A-289.32(2) because of neglect or abuse can thereafter be subject to criminal penalties is irrelevant in this case because the Petition brought against Ms. Lassiter did not contain such allegations of neglect or abuse.[3] Had such allegations been made against her, and as a

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[3]The bifurcation of North Carolina's proceedings in abuse, neglect, and dependency from those in termination of parental rights makes the prospect of criminal charges growing out of termination highly unlikely.

Reports of abuse or neglect must be made to and investigated by the Director of the Department of Social Services. G.S. § 7A-587 and 544. Based on that investigation, the Director may initiate custody (not ter-

result, she had been haled into Court to answer criminal charges of neglect or abuse pursuant to N.C.G.S. §14-316.1[4], -318.2[5],

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mination) proceedings. By virtue of G.S. § 7A-587 the parent would be represented in this proceeding. If the Director substantiates an abuse complaint, he must report it to the prosecutor, G.S. § 7A-548, who may initiate criminal charges. There is no requirement to report allegations of abuse or neglect in termination proceedings. If the Department obtains custody, the child is removed from the parents, which virtually eliminates the opportunity for further *physical* neglect or abuse, which is one of the grounds on which a termination proceeding may be based. G.S. § 7A-289.32(2). The Department cannot petition for termination unless it already has obtained custody through a proceeding wherein the parent (since January 1, 1980) has counsel. Ordinarily by the time the Department initiates the petition, this allegation carries less weight because the child has been removed from the parents in the previous proceeding.

Thus, criminal charges arising out of termination proceedings can only occur when the action is initiated by an individual, in which case Petitioner suggests counsel might not be required. Brief for Petitioner 50.

[4]G.S. § 14-316.1 states: *"Contributing to delinquency and neglect by parents and others.* Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. § 7A-517 shall be guilty of a misdemeanor."

[5]G.S. § 14-318.2 states: *"Child abuse a general misdemeanor.* — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physicial injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a)."

The cross referenced section reads: "every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both in the discretion of the court."

or -318.4[6] then counsel would have been appointed to represent her, because her personal liberty would have been jeopardized. (See Argersinger v. Hamlin, 407 U.S. 25 (1972). Questions, perhaps, of constitutional magnitude, as to the use of incriminating testimony elicited in a separate hearing, could then be raised.

C. In Any Action, Other Than One Affecting Individual Personal Liberty, Fourteenth Amendment Due Process Requires Only Notice And Opportunity For Hearing.

In other types of actions, (herein denominated "civil" because the interests affected are other than the individual's personal freedom), the procedures afforded require something else. The Court in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), considering the interest of the State of New York in employing judicial proceedings to settle trust accounts, laid down a principle of procedural due process that stands immutable today:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication

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[6]G.S. § 14-318.4 states: *"Child abuse a felony.* – (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or

(2) Bone fracture, or

(3) Substantial impairment of physical health, or

(4) Substantial impairment of function of any organ, limb, or appendage of such child,

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of a child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies."

be preceded by *notice and opportunity for hearing appropriate to the nature of the case.*" *Id.*, at 313 (emphasis added).

The Petitioner, in her brief, makes much of the Court's use of the language "appropriate to the nature of the case." Brief for Petitioner 9. The "notice" invalidated in *Mullane* was notice by publication, held insufficient because it did not name those affected by the action and because service by mail, or even personal service, could have been made on those individuals whose addresses were known. "Appropriate to the nature of the case" there meant such "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections." *Id.*, at 314. (citations omitted).

The Court in *Armstrong v. Manzo,* 380 U.S. 545 (1965) set forth the principle that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." Ms. Lassiter seems to infer special meaning from these words, also. *See,* Brief for Petitioner 9. In *Armstrong,* the problem with the hearing was that it occurred *after* the entry of the adoption decree, thus unfairly shifting to Mr. Armstrong the burden of proof as to whether adoption of his child without his consent was appropriate under Texas law. The Court ruled that his objections to the adoption would have been more meaningful and appropriate if heard prior to the adoption, not after. *Armstrong v. Manzo, supra,* at 522.

What "appropriate to the nature of the case" and "meaningful time and in a meaningful manner" mean in terms of due process has been further defined by the Court. For example, *Goldberg v. Kelly,* 397 U.S. 254 (1970) requires an administrative hearing, replete with oral testimony, cross examination of witnesses, rules of evidence, and representation, if desired, by retained counsel, *before* welfare benefits can be terminated. The Court has specifically refused to say that counsel must be provided. *Id.*, at 270.

In *Stanley v. Illinois,* 405 U.S. 645 (1972), the Court invalidated an Illinois statute that allowed for the removal without any notice and hearing, of illegitimate childrem from

their unwed father because of an irrebuttable statutory presumption that unwed fathers are unfit to maintain custody of their children.

> "[A]s a matter of due process of law, Stanley was entitled to a *hearing* on his fitness as a parent *before* his children were taken from him . . .
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> * * * * *
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> "Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him." *Id.*, at 649, 652-655, (emphasis added).

Boddie v. Connecticut, 401 U.S. 371 (1971) recognized and reiterated these principles of Fourteenth Amendment Due Process. The problem in *Boddie* was that the State's filing fee requirement in initiating a divorce action forced indigent individuals who could not afford to pay the filing fee, to remain married.

> "[W]e are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval.
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> * * * * *
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> "[W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the state's judicial machinery . . . [P]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.*, at 376-377.

The result of *Boddie* was that the "meaningful opportunity to be heard" meant that the indigent seeking a divorce was given an opportunity to get into Court to be heard in the first instance, not that once he got there presentation of his claim would have been more meaningful if counsel was appointed to assist him. "[A] state may not, consistent with the obligations imposed on it

by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens *access* to the means it has prescribed for doing so." *Id.*, at 383, (emphasis added).

The Court's holding was a result of not only its recognition that "marriage involves interests of *basic importance* in our society" (emphasis added), but a recognition also that the judicial forum was the *only* means to legally dissolve it. Absent

If means alternative to a court hearing are available to resolve questions about liberty or property interests,[7] or if the right or interest claimed is less than fundamental,[8] then free access to court is not an absolute requirement.

Ms. Lassiter does not contest the fact that she was given ample notice of both the proceeding and the hearing , and through no expenditure of her own energies, was present at the hearing and afforded the opportunity to be heard. The procedural protections required by *Mullane, Armstrong, Stanley,* and *Boddie* were unquestionably present in this case. What Ms. Lassiter seeks to do is to append the application of one fundamental right; the right to counsel (including by the analogy to criminal cases, appointed counsel), to another; parental rights, by saying that because those rights also are fundamental, they are as deserving of the same protection in a proceeding to terminate them, as the individual's personal freedom at stake in the criminal proceeding. As indicated above, a fair reading of the Bill of Rights and those cases preserving the right therein guaranteed against unwarranted State intrusion do not allow latitude for such procedural due process bootstrapping.

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[7] *United States v. Kras,* 409 U.S. 434 (1973) held that a discharge in backruptcy "tough important . . . does not rise to the same constitutional level" as the interest in *Boddie,* and adjustments of debts could be made outside the judicial forum.

[8] In *Ortwein v. Schwab,* 410 U.S. 656 (1973) the Court held that welfare benefits have less constitutional significance, and do not require free access to court, especially where an administrative hearing as required by *Goldberg v. Kelly,* 397 U.S. 254 (1970), has been afforded.

III. A DECISION THAT REQUIRES APPOINTMENT OF COUNSEL HERE BECAUSE PETITIONER'S LIBERTY INTEREST IN HER CHILD IS FUNDAMENTAL WOULD REQUIRE APPOINTED COUNSEL FOR ANY INDIGENT FACED WITH DEPRIVATION OF A FUNDAMENTAL LIBERTY INTEREST.

The Court, as pointed out in *Gideon v. Wainwright,* 372 U.S. 335 (1963) "has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States." *Id.,* at 341. Those rights already placed in that category and "therefore made immune from state invasion by the Fourteenth . . . are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition of redress of grievances." *Id.,* at 341. Other liberty interest, as pointed out by Mr. Justice Douglas in *Griswold v. Connecticut,* 381 U.S. 479 (1965) though not specifically provided for in the Bill of Rights, are afforded protection under the Fourteenth Amendment, because they come within the "penumbras" of, or are "emanations" from, the Bill of Rights' guarantees. *Id.,* at 484. Virtually every aspect of marriage, family and parent-child relationships have, been deemed by this analysis, "fundamental" for the purpose of bringing them within the scope of the Due Process Clause of the Fourteenth Amendment. *See,* footnote 2, *supra.*

Ms. Lassiter would have the Court declare that because her right to her child is fundamental, counsel must be appointed to represent her, an indigent, in an action terminating that right. An indigent defendant in an action for libel or slander could assert the same claim. Surely an indigent defendant in a divorce action has a fundamental right not to be deprived unfairly of the marital relationship and could assert the same right to appointed counsel in a divorce action. Especially with regard to divorce actions, this result would be required by the language of *Boddie v. Connecticut, supra.*

> "[B]ecause resort to the state courts is the only avenue to dissolution of their marriages, [r]esort to the judicial

> process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court . . . In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum." *Id.*, at 377.

Petitioner argues that this result would not follow however, in civil actions where the fundamental liberty interest is being deprived by another individual, such as child custody disputes between two parents, (and presumably termination of parental rights actions initiated by one parent or other individual as provided for by N.C.G.S. §7A-289.24) as opposed to those initiated by some governmental entity. Brief for Petitioner 50. Ms. Lassiter states in her brief that "unlike child custody disputes, termination of parental rights cases are government initiated proceedings . . . *Id.* This clearly ignores the statutory section cited above. Surely, the indigent parent can derive little solace from the fact his rights are terminated by another individual rather than a governmental entity.

Further, Petitioner argues that most civil cases do not impinge upon such fundamental rights. Brief for Petitioner 50. However, every domestic relations action (divorce, action for child support, custody proceeding) involves a fundamental right as they have been defined by the Court, and in North Carolina alone, from July 1, 1978 until June 30, 1979 there were 54,063 domestic relations actions filed compared to only 46,397 other general civil actions.[9]

Petitioner finally argues that even in some civil actions that do implicate fundamental rights, such as child custody disputes between parents, the nuclear or extended family avoids total destruction because the child usually continues to live with one of the parents. Brief for Petitioner 50. It is hard to conceive that the loss to Mr. Armstrong of his child by adoption was any less significant because Mr. Manzo, her adopted father, happened

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[9]*North Carolina Courts, 1978-79 Annual Report of the Administrative Office of the Courts* 113.

to be married to his child's mother. *Armstrong v. Manzo,* 380 U.S. 545 (1965).

Thus far this discussion has focused on the indigent defendant faced with court action affecting a fundamental liberty interest. It is not inconceivable however, that following the import of *Boddie v. Connecticut, supra,* a plaintiff, seeking to vindicate a fundamental right would be entitled not only to proceed *in forma pauperis,* but also to court-appointed counsel. Surely, if the *Boddie* analysis would require free access to the only forum wherein one could be heard to adjust a fundamental relationship, Petitioner's analysis would require "the guiding hand of counsel" to ensure effective hearing. *Powell v. Alabama,* 287 U.S. 45 (1932). The same would be true with any indigent seeking to avoid deprivation or unnecessary infringement of any one of those fundamental liberty interests guaranteed by the Bill of Rights and worthy of Fourteenth Amendment Due Process. The potential possibilities are beyond the range of reasonable speculation, and the costs to the states in judicial time and fiscal expenditures are beyond the range of reasonable budgetary computation.

IV. THE PRESENT TREND AMONG A LARGE NUMBER OF STATES REQUIRING COUNSEL BY STATUTE OR COURT DECISION INDICATES THAT APPOINTMENT OF COUNSEL IS DESIRABLE, BUT IS NOT REQUIRED FOR THAT REASON ALONE.

The Respondent readily admits that there is a popular trend among the various states that have either by legislative enactment or judicial decree, provided that counsel be appointed for indigent parents in various actions affecting their relationship to their children. *See generally,* Brief for Petitioner 15, nn 6-9, and Appendix B. Also respondent is aware of the various model statutes and codes that are recommended as guidelines to follow in considering and drafting proposed legislation to regulate the family relationship at stake here. *See generally,* Amicus Brief of American Bar Association 18-20.

While I would in no way try to ignore or minimize the collective wisdom reflected by these various legislatures, courts, and organizations who have expressed their opinions on this subject, I must submit respectfully that this trend in opinion, though persuasive, should not be the basis on which a constitutional decision is made. The Court must look to the Constitution and ascertain whether the right claimed can be found or implied within its provisions. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1972). The right to appointed counsel at state expense to protect a right, other than the individual liberty interest contemplated by the Sixth Amendment, is not found in the Constitution. I submit that the Due Process Clause of the Fourteenth Amendment reasonably cannot be read to require it in this instance without extending it to every right deemed fundamental. Therefore, its provision is a matter of legislative policy.

At the writing of this brief, there are some thirty-three states and the District of Columbia that have legislation authorizing appointment of counsel for the indigent parent in proceedings to terminate parental rights. *See,* Brief for Petitioner, Appendix B. North Carolina provides for appointment of counsel for certain parents in some special circumstances. G.S. § 7A-289.23 requires a guardian ad litem for a defending parent under the age of fourteen years, and, effective August 24, 1980, requires appointed counsel to represent a parent against whom a termination petition alleging mental incapacity as a basis for termination is brought.[10] The basis for such appointments however,

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[10]As part of the same amendment, G.S. § 7A-289.32, entitled *Grounds for terminating parental rights,* was amended by adding subsection (7) which reads; "That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. § 7A-517(13), and that there is a reasonable probability that such incapacity will continue throughout the minority of the child."
Counsel for the Respondent is the author of that amendment.

is not indigency, but the traditional concept that infants and incompetents cannot represent adequately their own interests.[11]

The North Carolina legislature has considered other bills to provide for appointed counsel for all indigent parents in termination of parental rights proceedings. During the 1977 Session, identical bills, Senate Bill 23 and House Bill 76, both introduced on January 26, 1977 would have allowed the trial judge, in his discretion, to appoint counsel at state expense for the indigent parent. Senate Bill 23, was reported favorably out of the Senate Committee on the Judiciary on February 2, 1977, and sent to the Joint Committee on Appropriations. House Bill 76 was reported favorably out of the House Committee on the Judiciary on April 19, 1977, and sent to the Joint Committee on Appropriations. These bills and their histories are found in Appendix A. No further evidence of their being considered by the respective legislative bodies is indicated, and it is presumed they died in the Joint Appropriations Committee.

Effective, January 1, 1980, G.S. §7A-587 provides that indigent parents in abuse, neglect, and dependency proceedings are entitled to court-appointed counsel. Petitioner declares this distinction between termination actions and neglect, abuse and dependency proceedings to be ironic. (Brief for Petitioner 43 n. 48). However, there are sufficient differences to justify the distinction.

The Respondent Department in its Brief In Opposition, filed in response to the Petition for Certiorari, discusses in some detail the statutory scheme, provided for reporting, investigating and disposing of allegations of abuse, neglect and dependency in North Carolina. These statutes are reproduced in Appendix B. *See, generally,* Respondent's Brief in Opposition 7-8. This is the state's *parens patriae* function which has been delegated to the county Department of Social Services. Actions brought under these statutes represent the initial intrusion by the state into the private realm of family life. This intrusion is

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[11]The statutory section cited specifically refers to G.S. Rule 17, 1A-1 of the Rules of Civil Procedure. Subsection (c) of that rule is titled *Guardian ad litem for infants, insane, or incompetent persons.*

made necessary when the parents, who are presumed to be acting in the child's best interests, demonstrate by their actions that they are not. *See, Parham v. J.R.*, 442 U.S. 584, (1979); *Stanley v. Illinois*, 405 U.S. 645 (1971). Such demonstration requires state intervention to ensure protection of the child through, as the legislature describes it, "a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety. (G.S. §7A-516 (3)) As recognized in Stanley, *supra*, "these are legitimate interests, well within the power of the State to implement. We do not question the assertion that neglectful parents may be separated from their children." *Id.*, at 652.

Recognizing the importance of the family unit, and the significance of the intrusion into it by this intervention, the state has provided that parents be given notice, (G.S. §7A-560)) and an opportunity to be heard, (G.S. §7A-565) allowed to be represented by counsel, appointed if they are indigent, (G.S. §7A-586 and 587 and a hearing (G.S. §7A-629) in which the rules of evidence applicable to civil proceedings apply, (G.S. §7A-634(b)) and the burden of proof is clear, cogent and convincing evidence. (G.S. §7A-635). The judge has broad discretion to enter a dispositional order (which may include consideration of the many community based services that Petitioner refers to, Brief for Petitioner 30) to endeavor to meet the needs of the child and his parent, individually, and as a family unit. (G.S. §7A-647).

After the child has been removed from his parents, the interests of the parent and those of the child may diverge. When the parents demonstrate "that they will not provide the degree of care which promotes the healthy and orderly physicial and emotional well-being of the child . . .," (G.S. §7A-289.22(1)) then recognition of the child's interest in a "permanent plan of care" (G.S. §7A-289.22(2)) must focus away from his parents. The statutes providing for termination of parental rights in effect at the time this action was filed are also reproduced in Appendix B.

The legislature has recognized that those individuals or agencies standing *in loco parentis* to the child (G.S. §7A-289.24)

assume an interest in planning for his future. At such point as they realize that the child's need for a permanent plan of care apart from his legal or biological parent outweighs the interest in maintaining the integrity of the family unit, *See, Parham v. J.R. supra,* at 602, then they are authorized to petition the court for a determination of whether or not termination of the parent's rights are in the child's best interest.

It cannot be denied that the state has interests in these proceedings. The state is required by law to maintain the State Foster Home Fund G.S. 108-23(5), and provides up to 50% of the costs of care of children in foster care under the Foster Home Fund. (The County must provide the balance.) But the supreme interest, as reflected in the statement of legislative intent, G.S. §7A-289.22, is that of the child. With regard to those children living with individuals authorized to initiate termination petitions, the state's interests is *de minimis.*

On the other side of the coin however, the State has a significant interest in not establishing a system of appointed counsel in these proceedings. The State could authorize payment of counsel in those actions initiated by a department of social services, but if the basis for doing so is to preserve a fundamental family interest of the responding parent, then the state would be foreclosed by the Equal Protection Clause of the Fourteenth Amendment from denying appointed counsel for the indigent parent in *any* proceeding brought under the termination statute, regardless of who initiates it. Nowhere is it required that the state fund lawyers to represent parties in a purely private controversy, regardless of whether the interests involved are fundamental or not.

Ms. Lassiter states, without citation of authority, that if the county department of social services initiates the termination action, that the district attorney or county attorney will represent the department in the proceeding. Brief for Petitioner 26. There are several counties in North Carolina, as reflected in Appendix C, where the departments of social services present their termination petitions *without* benefit of counsel. The point to be made is not that counties cannot afford counsel any better than parents, but that the inherent imbalance of resources in these

proceedings is not nearly as great as that alluded to by the Court in *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) in extending the right to counsel in criminal actions to include appointed counsel.

Though the efforts of the departments of social services in both abuse, neglect, and dependency proceedings and termination actions arise from concern for children and their families, the former actions result from and reflect, the public's interest in the protection of the children, while the latter actions do not. It is this distinction which justifies the appointment of counsel in the abuse, neglect, and dependency proceedings representing the initial intrusion into the fundamental family unit, while not requiring it in the termination actions where the interests are more individual, private, and (as far as the "family" interest is concerned) less fundamental. Part V, B-C, *infra.* This is where the state of North Carolina has drawn the distinction. "[A] state can, consistent with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process . . . Absolute equality is not required; lines can be and are drawn, and we often sustain them." *Douglas v. California,* 372 U.S. 353, 356-357 (1963).

While appointment of counsel in both termination of parental rights and abuse, neglect and dependency proceedings may be desirable as a matter of social policy as indicated by the trend in other states, such provisions, absent constitutional mandate, are within the legislative prerogative. As stated by Mr. Justice Douglas in *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955):

> "[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirements . . . The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws . . . because they may be unwise, improvident or out of harmony with a particular school of thought." *Id.,* at 487-488.

He reiterated this idea in *Griswold v. Connecticut,* 381 U.S. 479 (1965): "We do not sit as a super-legislature to determine the

wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Id.*, at 482.

While it is apparent that the legislature of North Carolina is reluctant to provide, wholesale, for appointed counsel for the indigent parent in termination proceedings, it is in that forum that the right to appointed counsel should be created, if at all, The legislatures of the various states are in a much better position to regulate the extent of application of such a right, and such regulation should be left to them. "For protection against abuses by legislatures the people must resort to the polls, not to the courts". *Munn v. State of Illinois,* 94 U.S. 113, *Quoted in Williamson v. Lee Optical of Oklahoma, supra,* at 486.

V. APPOINTMENT OF COUNSEL IS NOT REQUIRED IN THE INSTANT CASE BY THE PRINCIPLE ENUNCIATED IN *MATHEWS V. ELDRIDGE,* 424 U.S. 319 (1976).

As indicated by Ms. Lassiter, Brief for Petitioner 18, the Court in *Mathews v. Eldridge,* 424 U.S. 319 (1976) set forth a triparite test,[12] or balancing mechanism to be used in deciding "[w]here procedural due process must be afforded . . ." because a property or liberty interest is implicated. *Smith v. Organization of Foster Families,* 431 U.S. 816, 847 (1977).

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[12]The specific language enunciated by the court in *Mathews v. Eldridge,* is as follow:

> "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probably value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 335.

A. The *Mathews* Principle Is Not Applicable To A Judicial Proceeding Where The Person Whose Rights Are Affected Is Given Notice And Opportunity To Be Heard Prior To A Decision.

At the outset of this discussion Respondent would suggest that the *Mathews* principle as a rule of law, is inapposite to this action. The process of refining due process applications until the present statement of the principle in *Mathews* took place over a long period of time. The cases cited by the Court in *Mathews* involve the determination of *when* and *in what manner,* individuals would be afforded a hearing relative to some claimed right or interest. *Mathews v. Eldridge, supra,* at 332-34. Clearly, however, the actions challenged in those cases as denying due process were either administrative,[13] or *ex parte* quasi-judicial actions[14] negatively affecting the right or interest without giving the individual notice and opportunity to be heard prior to the action. In fact, the very question in *Mathews* was whether the Social Security Administration could terminate disability payments before affording the recipient an evidentiary hearing, ultimately, before a Social Security Administration law judge. The balancing of the individual interest against that of the government was required to ensure that the methods the government had adopted to regulate Social Security disability did not deprive the recipient of his benefits erroneously Implicit in this reasoning is that the government was acting in its own interest through its own devices to regulate benefits. Clearly the government has an advantage under those circumstances. This advantage is reduced when, as here, the Department is asking the Court to terminate parental rights in full evidentiary hearings.

Had the Department, under some statute or regulation, made some administrative decision that legally was binding on Ms. Lassiter with regard to her right to the child without affording her a prior opportunity to be heard, then the *Mathews* balanc-

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[13] *See e.g., Board of Regents v. Roth,* 408 U.S. 564 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970).

[14] See e.g., *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Armstrong v. Manzo,* 380 U.S. 545 (1965).

ing approach would be applicable to the case at bar. However, Ms. Lassiter was given all the notice and opportunity to be heard required by the Due Process Clause of the Fourteenth Amendment prior to the determination of her interests, *Goldberg v. Kelly, supra; Armstrong v. Manzo,* 380 U.S. 545 (1965), and in view of her failure to respond to the Petition, perhaps more. *See, Boddie v. Connecticut, supra,* at 378-79. (In fact, it reasonably could be argued that the efforts of counsel for the Department to ensure her presence at the hearing violated her right to waive the opportunity to be heard.) This was not an administrative proceeding or an *ex parte* judicial proceeding. It was a full evidentiary hearing, with both parties present, testifying and cross-examining witnesses, prior to the termination of her rights. Regardless of Ms. Lassiter's assertion that the right affected is a fundamental right, procedural due process requires no more than was provided to her in this proceeding.

B. The Right To Maintain A Purely Biological Relationship To One's Child Is Less Fundamental Than The Right To Family Integrity.

As pointed out above, the concept of family integrity derives from the idea of togetherness. In *Parham v. J.R.,* 442 U.S. 584 (1979), this Court stated it this way: "Our jurisprudence historically has reflected western civilization concepts of the *family as a unit* with broad parental authority over minor children. Our cases have consistently followed that course. . . " *Id.,* at 602 (emphasis added). Implicit in the cases decided by the Court recognizing family integrity is that the care, custody, and nurturance,[15] medical care,[16] religious indoctrination, inculcation of morality[17] education instruction,[18] and decision whether

[15] *See, Prince v. Masachusetts,* 321 U.S. 158 (1944)

[16] *See, Parham v. J.R., 442 U.S. 584 (1979)*

[17] *See, Wisconsin v. Yoder,* 406 U.S. 205 (1972)

[18] *See, Wisconsin v. Yoder, supra; Pierce v. Society of Sisters,* 268 U.S. 520 (1925)

or not to have children[19] can best be determined within a cohesive family unit, precisely because the children are living with their parents who are presumed therefore, to be in the best position to act in the children's best interests. This Court has recognized, however, that this is not an irrebuttable presumption: "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this." *Parham v. J.R., supra,* at 602.

The Department does not challenge the Petitioner's claim that the right to family integrity is one of the most fundamental rights known to man. *See,* Brief for Petitioner 19. But, "[P]arental Rights do not spring fullblown from the biological connection between parent and child. They require relationships more enduring." (*Caban v. Mohammed,* 441 U.S. 380, 397, (1979), (Mr. Justice Stewart, dissenting). The "family integrity" of which Ms. Lassiter insists she was deprived is somewhat different therefore, from that contemplated in those cases defining family integrity as a fundamental interest.

> ". . . [T]he importance of the familial relationship, to the individual involved and to society, *stems from the emotional attachments that derive from the intimacy of daily association* and from the role it plays in 'promoting a way of life' through the instruction of children, *Wisconsin v. Yoder,* 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship. *Smith v. Organization of Foster Families,* 431 U.S. 816, 844. (1977) (emphasis added.)

While it is unchallenged that the right to the care and custody of one's child is fundamental, the Respondent respectfully suggests that once the state has, through a custody proceeding, invaded this sphere of fundamentally protected interest, the parent's interest thereafter must be balanced not only against that of the state, but also that of the child. In *Morrissey v.*

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[19]*See, Griswold v. Connecticut,* 381 U.S. 479 (1965); *Skinner v. Oklahoma,* 316 U.S. 535 (1942).

Brewer, 408 U.S. 471 (1972) the Court drew a distinction between the unqualified liberty interest of the unconvicted person, and that of the convicted parolee whose liberty interest was made conditional by the conviction which required him to meet the conditions of his parole to remain free. *Id.*, at 480. Because his freedom was qualified by a conviction and conditional upon his complying with the terms of parole, he was entitled to less due process in a parole revocation hearing than in a trial of the criminal charge. *Id.*, at 489.

An appropriate analogy can be drawn between the parent's right to family integrity, and the personal liberty interest of the parolee. When the child is with the parent, who is presumably acting in his best interests, the parent's interest in family integrity is unqualified. Efforts to intervene require the most due process the Fourteenth Amendment will allow. However, after the state intervenes in an abuse, neglect, or dependency proceeding and removes the child from the custody of the parent, then the parent's interest becomes qualified and therefore conditional on his continuing to act in a parental fashion toward the child. Subsequent legal actions affecting that qualified, conditional interest would, by the analogy to *Morrissey,* require somewhat less due process.

If the parent allows his continued interests in the child to atrophy while he is in the care of, and in daily association with, other individuals, then by the definition of the familial relationship set out in *Smith v. Organization of Foster Families, supra,* the parent's interest devolves more and more to a mere blood relationship and becomes less and less fundamental. The familial relationship of the child becomes linked more and more clearly with those individuals with whom he is in daily association. The longer the child continues in this substitute family relationship, the greater becomes not only his physical and emotional interest in maintaining that relationship, but also the recognition that this interest has legal significance when balanced against that qualified interest of his biological parent. *Smith v. Organization of Foster Families, supra,* 844 (1972).

It is the recognition of this divergence in the interests of the parent and child and the importance to the child of physical and

emotional stability deriving from an intact, functioning family unit that is reflected in the legislative intent of the North Carolina statutory scheme provided for termination of parental rights. *See,* N.C.G.S. §7A-289.22(3) The child develops a right to a familial relationship separate and apart from the parent's right to maintain the blood relationship. Thus the balancing of these interests must shift from consideration of the parent's interest in an intact family unit, *vis a vis* the state, to that of the parent versus that of the child. *See,* N.C.G.S. §7A-289.22(3). I would submit therefore, that the parent's right to maintain that purely biological relationship is no more fundamental in due process terms, than the right to maintain that conditional qualified personal liberty of the parolee in *Morrissey.*

C. Petitioner's Lack Of Interest In Her Child Had Reduced Her Right To Him To A Purely Legal One Devolved From The Blood Relationship.

It is clear that there is no familial relationship deriving from the intimacy of daily association between Ms. Lassiter and her son, William. He was born on September 26, 1974 and was only eight months old when he was removed from the custody of his mother because of neglect and placed in foster care on May 23, 1975. Joint Appendix, 5-6. At that time her daily association with him ceased. The record indicates that she has seen him no more than three times since he went into foster care. From that time on, her right to care for, nourish, raise, educate and enjoy the companionship of her child, *See, Stanley v. Illinois,* 405 U.S. 645, 651(1972) was markedly attenuated. It was the custody proceeding that deprived her of these fundamental family rights, long before the Petition to terminate her rights was filed. However, she did not challenge that proceeding on appeal, nor even appear to contest the hearing that resulted in the removal of the child. Transcript of Evidence 29.

The removal of William from Ms. Lassiter per the custody proceeding in May, 1975 rebuts in this case the presumption that Ms. Lassiter always acted in his best interests. One can further infer from the fact that she failed to appear at the hearing on

that removal failed to contact the Department with a single inquiry as to his whereabouts or care, or to make one request for a visit with him,[20] Transcript of Evidence 20, that her interest in him dissipated rapidly. The child was in the custody of the Department for more than a year prior to her incarceration, yet Ms. Lassiter made no effort to express any interest or affection toward him. One would think that seeing him in a chance encounter in town, Transcript of Evidence 36, would have stirred those "natural bonds of affection" in Ms. Lassiter enough to make her inquire about his welfare. *See,* Parham v. J.R., supra, 602. The *Affidavit* of Mr. Loflin, Joint Appendix 11, would indicate tht Ms. Lassiter can read and write, as she wrote to him about potential relief from imprisonment,[21] yet she never wrote to the Department about the child. Transcript of Evidence 15-16. While it is true, as Ms. Lassiter indicates, that her incarceration would prevent a finding of willful abandonment, Brief for Petitioner 37, it would not prevent her from "establishing or maintaining concern . . . as to his welfare," G.S. §7A-289.32(1) or in making and following "through with constructive planning for the future of the child." G.S. §7A-289.32(3).

The final indication of the actual lack of interest in the child is that even though Ms. Lassiter made objections at the hearing to the court's termination of her rights, nothing has been done to protect her relationship to the child pending the outcome of this appeal, even though G.S. §7A-289.34 specifically allows for "temporary orders affecting the custody or placement of the child" pending appeal of the Order of Termination. Though

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[20]The one visit Ms. Lassiter had with William in December, 1979 was arranged by the Department. Transcript of Evidence 20.

[21]It is not unreasonable to assume that by the time of the hearing on August 31, 1978, Ms. Lassiter as a result of her association with Mr. Loflin, was far more interested in the efforts to have her released from prison, than in maintaining her rights to her son. *But cf, In re Gibson,* 438 P.2d 131, 135 (1971). (parental rights are "more precious to many people than the right to life itself.") This may explain her failure to mention this proceeding to him.

Notice of Appeal was promptly filed, Joint Appendix 9, no motion or petition was filed to have the court stay the effect of the termination order, or to provide for any activity that would preserve whatever meaningful relationship there might have been pending appeal.[22]

VI. THERE IS LITTLE RISK OF ERRONEOUS TERMINATION OF PARENTAL RIGHTS INHERENT IN THE NORTH CAROLINA STATUTORY SCHEME PROVIDED FOR SUCH TERMINATIONS.

A. The Statutory Scheme Is Designed To Prevent Erroneous Terminations Where A Meaningful Relationship Exists Between Parent And Child.

The statement of legislative intent in the termination statutes, G.S. §7A-289.22 *et seq.*, reflects the recognition that family integrity is of significant importance to both parent and child. Therefore, the jurisdiction to consider petitions to terminate rights is in a court, not any administrative agency. G.S. §7A-289.23. Only individuals or agencies who by law or other-

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[22]*See, Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) at 844. The minor continued to live in the same foster home until the Petition for Discretionary Review was denied by the North Carolina Supreme Court on January 17, 1980. Joint Appendix 28. Until that time, he was considered a "legal risk" for adoptive placement because of the possibility of reversal of the order terminating parental rights. Thereafter he was placed in a pre-adoptive home with foster parents committed to formal adoption to become his legal parents. He continues there to date. The Petition for Certiorari was filed in this Court prior to initiation of any adoption proceedings in the State Court. Counsel for Ms. Lassiter asked for and received assurance from Counsel for Department that no adoption would be undertaken pending the final outcome of the appeal in this Court. This was done to obviate his filing of a motion *in limine* to stay such action.

wise standing *in loco parentis* have responsibility for the child, can initiate such action. G.S. §7A-289.24. Notice of the proceeding by way of service of Summons and Petition must be given to the parent, who, after being served, has thirty (30) days in which to respond or "be heard". G.S. §7A-289.27. *See, Armstrong v. Manzo,* 380 U.S. 545 (1965); *Mullane v. Central Hanover Trust Co.,* 339 U.S. 306 (1950); Should the parent fail to respond, presumably waiving his opportunity to be heard, and order terminating his right will be entered on default at a required hearing before the court, G.S. § 7A-289.28, provided the court at that hearing does not determine either that grounds for termination do not exist, G.S. §7A-289.31 (c), or that the best interest of the child require that rights not be terminated irrespective of the existence of grounds for termination. G.S. 7A-289.31 (a) and (b).

These statutory procedures are an effort to provide for the objective examination of the respective interests of the child and the parent by a court in an evidentiary hearing. This is done only after all interested parties have been given the requisite notice and opportunity to be heard in such proceeding before parental rights are terminated. It is these procedural due process requirements that are considered essential to preserve some liberty or property interest. *See, generally, Parham v. J.R.,* 442 U.S. 584 (1979); *Smith v. Organization of Foster Families,* 431 U.S. 816 (1977); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Armstrong v. Manzo, supra,* and *Mullane v. Central Hanover Trust Co., supra.* There is no question that Ms. Lassiter was afforded ample due process in this action. Whether or not the filing of a written answer is a prerequisite to being afforded notice of the hearing, Ms. Lassiter not only received notice, but also was present and was heard.

"Procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge, supra,* at 344. Petitioner argues that without representation by counsel, the risk of erroneous deprivation in termination proceedings

under the statutory scheme is substantial. Brief for Petitioner 27. This does not seem to be the case, however.

As Petitioner correctly points out, Brief for Petitioner 48, statistics reflecting numbers of termination proceedings and related questions are rare. In North Carolina there are no apparent means of tracking such information. Therefore, in early November, 1980 a questionnaire was sent by counsel for the Department to each of the 100 counties of the state seeking information relative to termination proceedings. By December 5, 1980 seventy-three of the counties had responded. A copy of the questionnaire and the responses received from each county are found in Appendix C. The raw data has been submitted to the Counsel for Petitioner for their use. While it is admitted that these are of quite limited use, they are offered as the only available statistical information related to termination proceedings in North Carolina.

The results of the survey indicate that since October 1, 1977,[23] there have been at least 768 actions to terminate parental rights initiated by the county departments of social services in 73 of the 100 counties. In about 127 of these, or 16.5% the parents were represented by counsel. In only six were the rights not terminated even though grounds for termination existed. In only two were the petitions dismissed for lack of grounds for termination. That in six cases the court refused to terminate in spite of grounds, does not mean necessarily that this resulted from legal representation. In at least one case, the judge refused to terminate even though grounds existed and the parent was not represented by counsel.

There was no consistent reporting of the number of cases where the parents were not represented, but contested the action. Under Petitioner's theory these are where erroneous terminations occur. The seven cases where counsel assisted the parent and rights were not terminated represently only 5.5% of all cases where counsel was present. The other 94.5% are, under

[23]This is the effective date of the present termination statute.

Petitioner's theory, assumed to be correct in spite of representation by counsel. Many counties, however, reported that most of their petitions were either against absent fathers who were served by publication, or that the parent, otherwise served, failed to respond.[24] These numbers are of further significance because they reflect that the department does not often bring actions that are groundless. In 6 out of the 8 cases where rights were not terminated, grounds existed, but rights were not terminated for other reasons.

Finally, Respondent would not deign to argue that the presence of counsel would not facilitate the submission of evidence in a hearing. However, a reading of the grounds for termination does not lead to any definitive conclusions that a layman cannot understand the allegations inherent therein, and tell the court how he has made some effort to maintain concern and a sense of responsibility for the child, or improved those conditions that led to the child being removed initially, or worked with the social services department to strengthen his parental relationship to the child, or planned for the child's future. It is unlikely that any court would not respond to any rational, realistic statement on the part of an unrepresented parent if it contains any indication that a meaningful familial relationship exists with the child. That only two cases out of 768 that were reported in the survey were dismissed because of lack of grounds is some fair indication that if there is some meaningful familial relationship the Department would not initiate the Petition in the first instance.

B. There Was No Error In This Proceeding For The Termination Of Petitioner's Rights.

In the hearing on August 31, 1978, Ms. Lassiter admitted that on the day of the custody hearing, June 16, 1975, the social

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[24]Illustrative of the comments are: Beaufort (8 cases) "only one parent has ever been present at the hearing." Catawba (22 cases) "majority of these are unknown fathers". Halifax (10 cases) "no parent has responded." Mecklenburg (123 cases) "85-90% of the parents do not respond at all, default." Robeson (16 cases) "all uncontested."

worker had called to tell her about the hearing. Transcript of Evidence 31, and that she told him ". . . I said, I ain't going . . . I jus said, I'm going to court about my own child?" Transcript of Evidence 32. When informed by the judge that he had sent a sheriff to get her, but she was not there, she responded that she had "just went up there to the store. Transcript of Evidence 33. Ms. Lassiter was generally vague in her responses to questions asked her about her relationship with her child.[25] However, with regard to her incarceration, she was quite specific.[26] Ms.

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[25]For example, Ms. Lassiter testified that "he knows all of us, my children."

QUESTION: How does he know you? How do you even know that he knows you if you haven't seen him in a year?

ANSWER: Well, he knows us.

QUESTION: Just because you are his family?

ANSWER: He knows us. Children know they family. I don't care which way it is, children know they family . . ." Transcript of Evidence 40.

Later she was asked:

QUESTION: And he has been in foster care for over three years of his four-year life, isn't that right? He was eight months old when he went into foster care, isn't that right?

ANSWER: Sir how would you feel if somebody came and got your child and took it away like that?

QUESTION: Just answer my question. He's been in foster care since he was eights months old?

ANSWER: I don't know how long he has been in there.

Transcript of Evidence 41.

[26]For example:

QUESTION: How long are you going to be in prison?

ANSWER: I don't know. I'm waiting for the hear from my lawyer soon.

QUESTION: What are you convicted of?

ANSWER: Well, I'm here. I'm here got accused, got a charge, I'm accused of murder, second degree murder and I'm accused of it. And I'm framed, or something.

THE COURT: How much time did the Judge give you?

ANSWER: Well, twenty-five to forty years. Transcript of Evidence 39.

Lassiter was given ample opportunity to tell about her relationship with her child. The evidence is clear, however, that she had not seen him enough to maintain any meaningful relationship, or made any realistic, sincere effort to express any interest or concern for his welfare.

In trying to get Ms. Lassiter to cross-examine the Department's witness, the judge asked her nine different times if she wanted to ask any questions. Transcript of Evidence 19-24. The one question Ms. Lassiter asked was: "I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us." The social worker began to respond by saying: "Ms. Lassiter, your son has been in foster care since May of 1975 and since that time . . ." Immediately, Ms. Lassiter cut her off with: "Yeah, yeah and I don't know anything about it either." Transcript of Evidence 20. Though the judge was patient with her in trying to confine her cross examination to questions, Ms. Lassiter tried to use the opportunity to argue with the witness.

Ms. Lassiter points out that she had wanted her child to be placed with her mother, and offered this as her "constructive plan" for the child. Brief for Petitioner 39-42. The social worker and grandmother contradicted each other as to whether or not she could take care of the child. *Compare,* Transcript of Evidence 14, with Transcript of Evidence 52. Evaluating the credibility of the witnesses in this contradiction and affording weight to their testimony is the prerogative of the trier of fact. The point of this recital is that it evidences an effort on the part of the social worker to consider this plan enough as an alternative to discuss it with both the Petitioner and her mother. There is a total lack of evidence that the grandmother ever made any effort at all to actively visit with the child, or plan with the social worker for him to live with her.

One final point needs to be made with regard to Petitioner's claim that because of her lack of representation, improper, incompetent and inadmissable evidence was elicited against her, and that defenses available to her went unnoticed. Brief for Petitioner 43 and 45. As with the refusal of the judge to grant a delay, Part I, *supra,* she could have preserved many of her exceptions to these alleged errors in the hearing in her Record on

Appeal, and assigned them as error to the North Carolina Court of Appeals. Her failure to do so constituted an abandonment of these claims under the North Carolina Rules of Appellate Procedure. *See,* Footnote 1, *supra.* Her appeal was perfected with assistance of counsel, and all these exceptions and potential assignments of error based thereon were available to her at the outset of her appeal. Therefore, her collateral quarrel with them now in the first instance as a procedural device to persuade the Court that appointment of counsel will correct them should not be afforded much deference.

VII. THE GOVERNMENT'S INTERESTS IN THIS TYPE OF PROCEEDING ARE SUBSTANTIAL.

The interest of prime importance in this proceeding is that of the child. The State of North Carolina has, as have most if not all states, provided for protection of the child in those instances where the parent cannot, or will not, provide the requisite degree of care and supervision. It was precisely that interest in the child's welfare that resulted in his being placed in foster care.

The state, by the procedures utilized in the termination proceedings, tries to balance the family interests of the individuals against the public treasury. It recognizes that many parents have little or no realistic interest in the child by the time a termination petition is filed. The procedures provided by the North Carolina statutory scheme balances this reality against the possibility that some meaningful relationship continues to exist. Thus, the significance of the family relationship requires a hearing in every case. The high default rate weighs against unnecessary expenditure of public money for appointed counsel in every case, or even those in which the parent is indigent. Ms. Lassiter argues that without counsel the parent is likely to make an unintelligent waiver of a right to contest the hearing. Brief for Petitioner 28. By this argument, the court would be forced to appoint counsel every time a Petition to terminate is filed, or at least whenever personal service is obtained, to ensure that the parent not only has notice, but also an opportunity to be heard. Under this set of circumstances, the appointment would have to

be made without any evidence of indigency, or the court would have to hold another, preliminary, hearing to determine indigency.[27] This idea runs contrary to Petitioner's theme that without counsel, "valuable judicial resources will be expended on cases that should not go to trial." Brief for Petitioner 29. It would increase vastly expenditure of judicial resources.

Further, it takes little imagination to see that with appointed counsel, virtually every case would be contested, increasing even more the expenditure of administrative and judicial resources. Presuming that with counsel, parents may contest cases that they ordinarily would not, then a guardian ad litem would have to be appointed to protect the minor child pursuant to G.S. § 7A-289.29(b). That would increase costs for cases significantly in spite of the indication that even with counsel, rights are terminated in the vast majority of the cases. Appendix C.

The potential costs of appointed counsel in termination proceedings only, is admittedly *de minimis* compared to the costs in all criminal actions. However when one considers the potential for requiring appointed counsel in any civil case where the indigent seeks to protect a fundamental right such as a domestic relations action, the costs would be substantial. More importantly than the costs involved, however, is the state's interest in facilitating the realization of a permanent plan of care for those minor children who have no realistic relationship with their biological parents, while affording those parents who are involved with their children the opportunity to show the degree and quality of that involvement. These are individual interests, and the state has afforded them protection by providing a statutory scheme that adequately balances the interest of the parent with that of the child in compliance with Fourteenth Amendment Due Process, without imposing an unnecessary financial burden on the state treasury.

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[2] If the parent will not respond to a Summons and Petition to Terminate her rights, why would she respond to a Summons to appear to offer evidence of indigency in order to appoint counsel to assist her to answer the Petition?

CONCLUSION

In this action brought to terminate her parental rights to her son, the Petitioner, Ms. Lassiter, had notice of the action, was present for the hearing, testified and was allowed to cross-examine witnesses. The Due Process Clause of the Fourteenth Amendment requires no more in an action where the interest affected is something other than one's individual personal freedom from restraint. Having been afforded the requisite due process, the petitioner's rights were terminated, and the Respondent Department requests that North Carolina Court of Appeal's affirmation of that action be sustained.

Respectfully submitted, on this the 15th day of December, 1980.

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APPENDIX

APPENDIX A

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1977

SENATE BILL 23

Short Title: Counsel in Parental Rights Cases. (Public)
Sponsors: Senator Britt.
Referred to: Judiciary II.

January 26, 1977

A BILL TO BE ENTITLED

AN ACT TO AMEND G.S. 7A-451 and 7A-288 SO AS TO PROVIDE COUNSEL, IN THE COURT'S DISCRETION, TO INDIGENT PARTIES IN A PROCEEDING FOR THE TERMINATION OF PARENTAL RIGHTS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 7A-451(1) is amended by adding a new subdivision thereto to read as follows:

"(12) A hearing for termination of parental rights as provided for in G.S. 7A-288."

Section 2. G.S. 7A-288 is amended by adding thereto between the second and third paragraphs a new paragraph to read as follows:

The court may, in its discretion, appoint counsel to represent one or more indigent parties as defined by G.S. 7A-450(a) in a proceeding under this section. Costs shall be borne by the State."

Sec. 3 All laws and clauses of laws in conflict with this act are hereby repealed.

Sec. 4 This act shall become effective upon ratification.

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1977

HOUSE BILL 76
Committee Substitute Adopted 4/19/77

Short Title: Provide Cousel, Indigent People. (Public)
Sponsors: Representative.
Referred to: Judiciary I.

January 26, 1977

A BILL TO BE ENTITLED

AN ACT TO AMEND GENERAL STATUTES CHAPTER 7A TO PROVIDE COUNSEL IN THE COURT'S DISCRETION TO INDIGENT PARTIES IN A PROCEEDING FOR THE TERMINATION OF PARENTAL RIGHTS.

The General Assembly of North Carolina enacts:

Section 1. G.S. Chapter 7A, Article 36, is amended by inserting therein the following new section:

"§7A-451-1. **Discretionary entitlement.** — At the discretion of the judge, counsel may be provided to any indigent party in a hearing for termination of parental rights under G.S. 7A-288."

Sec. 2. G.S. 7A-288 is amended by inserting after the second paragraph thereof the following new paragraph:

"The court may, in its discretion, appoint counsel at State expense to represent one or more indigent parties, as defined in G.S. 7A-450(a), in a proceeding under this section."

Sec. 3. This act shall become effective upon ratification.

INSTITUTE OF GOVERNMENT LEGISLATIVE SERVICE
LG085 P.O. BOX 7294 STATE LEGISLATIVE BUILDING RALEIGH, N.C. TEL. 733-2484

GENERAL ASSEMBLY OF NORTH CAROLINA

BILL HISTORY
AS OF 06/16/78

NOTE – SENATE AND HOUSE BILL NUMBERS ARE FOLLOWED BY THE SHORT TITLE, DATE OF INTRODUCTION, IDENTICAL BILL NUMBER IF ANY, PUBLIC OR LOCAL DESIGNATION, INTRODUCER NAMES, GENERAL STATUTE CHAPTERS OR OTHER SUBJECTS AFFECTED (OR COUNTIES, IF LOCAL BILL), AND ALL ACTIONS TAKEN.

S0023 COUNSEL FOR INDIGENTS-PARENTAL RTS 1-26-77 IDENT TO H0076 PUBLIC
INTRODUCERS-BRITT
SUBJ OR GS CHAPTERS - 7A JUDICIAL DEPT

1-26-77 S-REF TO COM ON JUDIC 2	0041	2-02-77 S-REPTO FAV AS AMENDED	0043
2-02-77 S-COM AMEND ADOPTED	0060	2-02-77 S-RE-REF COM ON APPROPRN	

S0023 6-30-77 S-POSTPONED INDEF 0945

H0076 COUNSEL FOR INDIGENTS-PARENTAL RTS 1-26-77 IDENT TO S0023 PUBLIC
INTRODUCERS-HELMS GILMORE/HAWORTH
SUBJ OR GS CHAPTERS-7A JUDICIAL DEPT

1-26-77 H-REF TO COM ON JUDIC I	0049	4-19-77 H-REPTD FAV COM SUBSTITUTE	
4-19-77 H-COM SUBSTITUTE ADOPTED	0475	4-21-77 H-PASSED 2ND & 3RD READING	0501
4-22-77 S-REC FROM HOUSE		4-22-77 S-REF TO COM ON COURTS	0389
4-27-77 S-REPTD FAV	0405	4-27-77 S-RE-REF COM ON APPROPRN	

APPENDIX B

GENERAL STATUTES OF NORTH CAROLINA CUMULATIVE SUPPLEMENT 1979

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41

Purpose; Definitions.

§7A-516. Purpose. – This Article shall be interpreted and construed so as to implement the following purposes and policies:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety. (1979, c. 815, s. 1.)

ARTICLE 44

Screening of Abuse and Neglect Complaints.

§7A-544. Investigation by director; notification of person making the report. — When a report of abuse or neglect is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services shall be held in strictest confidence by the Department.

If the investigation reveals abuse or neglect, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juveni'e's protection pursuant to Article 46 of this act.

In performing any of these duties, the Director may utilize the staff of the county Department of Social Services or any other public or private community agencies that may be available. The Director may also consult with the available State or local law enforcement officers who shall assist in the investigation and evaluation of the seriousness of any report of abuse or neglect when requested by the Director.

Unless a petition is filed within five working days after receipt of the report of abuse or neglect, the Director shall give written notice to the person making the report that:

(1) There is no finding of abuse or neglect; or

(2) The county Department of Social Services is taking action to protect the welfare of the juvenile and what specific action it is taking.

The notification shall include notice that, if the person making the report is not satisfied with the Director's decision, he may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive his right to this notification and no notification is required if the person making the report does not identify himself to the Director. (1979, c. 815, s. 1)

§7A-548. Duty of county Department of Social Services to report evidence of abuse. — If the Director finds evidence that a juvenile has been abused as defined by statute, he shall immediately make a written report of his findings to the prosecutor who shall determine whether criminal prosecution is appropriate and who may request the Director to sign the appropriate criminal warrant. The Director of the Department of Social Services shall submit a report of alleged abuse or neglect to the central registry under the policies adopted by the Social Services Commission. (1979, c. 815, s. 1.)

ARTICLE 45

Venue; Petition; Summons.

§7A-560. Petition. — The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of his parent, guardian, or custodian and shall allege the facts which invoke jurisdiction over the juvenile. Except in cases in which delinquency is alleged, the petition may contain information on more than one juvenile, when the juveniles are from the same home and are before the court for the same reason. In cases of alleged delinquency, the petitions shall be separate.

A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the accusation.

Sufficient copies of the petition shall be prepared so that copies will be available for each juvenile, for each parent if living separate and apart, for the court counselor or social worker, and for any person determined by the court to be a necessary party. (1979, c. 815, s. 1.)

§7A-565. Service of summons. — The summons shall be personally served upon the parent, the guardian, custodian, or caretaker, and the juvenile or counsel or guardian ad litem, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the judge.

If the parent, guardian, or custodian entitled to receive a summons cannot be found by a diligent effort, the judge may authorize service of the summons and petition by

mail or by publication. The cost of the service by publication shall de advanced by the petitioner and may be charged as court costs as the judge, in his discretion, may direct.

If the parent, guardian, or custodian is personally served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, he may be proceeded against as for contempt of court.

The provisions of G.S. 15A-301(a),(c),(d), and (e) relating to criminal process apply to juvenile pro ss; provided the period of time for return of an unserved summons is 30 days. (1979, c. 815, s. 1.)

§7A-586. Appointment of guardian ad litem. — When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to appear on behalf of the juvenile in the court proceeding and to perform necessary and appropriate legal services on his behalf; to present relevant facts to the judge at the adjudicatory hearing and to explore options with the judge at the dispositional hearing; to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge; and to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals.

The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to appear with the juvenile in any criminal action wherein he may be called on to

testify in a matter relating to abuse.

The guardian ad litem shall be an attorney-at-law, licensed to practice in the State of North Carolina. In no case may the judge appoint a public defender as guardian ad litem. The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge. (1979, c. 815, s. 1.)

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§7A-587. Parent's right to counsel. — In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. (1979, c. 815, s. 1.)

§7A-629. Adjudicatory hearing. — The adjudicatory hearing shall be held in the district at such time and place as the chief district judge shall designate. The judge may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted. (1979, c. 815, s. 1.)

§7A-634. Rules of evidence. — (a) Where delinquent or undisciplined behavior is alleged and the allegation is denied, the court shall proceed in accordance with the rules of evidence applicable to criminal cases. In addition, no statement made by a juvenile to the intake counselor during the preliminary inquiry and evaluation process

shall be admissible against the juvenile prior to the dispositional hearing.

(b) Where the juvenile is alleged to be abused, neglected or dependent, the rules of evidence in civil cases shall apply. (1979, c. 815, s. 1.)

§7A-635. Quantum of proof in adjudicatory hearing. – The allegation of a petition alleging the juvenile is delinquent shall be beyond a reasonable doubt. The allegations in a petition alleging abuse, neglect, dependence, or undisciplined behavior shall be proved by clear and convincing evidence. (1979, c. 815, s. 1.)

§7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile. – The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any two of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

(1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. Any department of social services in whose custody or physical custody a juvenile is placed shall have the authority to arrange for and provide medical care as needed for such juvenile.

(3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county. If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the local mental health, mental retardation, and substance abuse director or local mental health director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile

directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, mental retardation, and substance abuse director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet his needs. If institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, or custodian refuses to consent to mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, mental retardation, and substance abuse health director, the signature and consent of the judge may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a judge and an area mental health, mental retardation, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of his treatment, the hospital shall submit to the judge a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question. (1979, c. 815, s. 1.)

ARTICLE 24B

TERMINATION OF PARENTAL RIGHTS

Statutes In Effect At time This Action Was Filed In 1978

§7A-289.22. Legislative intent: construction of Article. — The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interest of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict; and to that end this Article should be liberally construed. (1977, c. 289, s. 8.)

§7A-289.23. Jurisdiction. — The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of

filing of the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. A guardian ad litem shall be appointed to represent such minor parent, under the age of 14 years. (1977, c. 879, s. 8.)

§7A-289.24. Who may petition. — A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or

(2) Any person who has been judicially appointed as the guardian of the person of the child; or

(3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

§7A-289.25. Petition. — The petition shall be verified by the petitioner and shall be entitled "In re (*last name of child*) a minor child"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

(1) The name of the child as it appears on the child's birth certificate, the date on place of

birth, and the county where the child is presently residing.

(2) The name and address of the petitioner and facts sufficient to identify the petitioner as one entitled to petition under G.S. 7A-289.24.

(3) The name and address of the parents of the child. If the name or address of one or both parents is unknown to the petitioner, the petitioner shall set forth with particularity the petitioner's efforts to ascertain the identity or whereabouts of the parent or parents. Such information may be contained in an affidavit attached to the petition and incorporated therein by reference.

(4) The name and address of any person appointed as guardian of the person of the child pursuant to the provisions of Article 1 of Chapter 33 of the General Statutes, or of G.S. 7A-286(7).

(5) The name and address of any person or agency to whom custody of the child has been given by a court of this or any other state; and a copy of such custody order shall be attached to the petition.

(6) Facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist. (1977, c. 879, s. 8.)

§7A-289.26. Preliminary hearing; unknown parent. — (a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner, the court shall within 10 days from the date of filing of the petition, or during the next

term of court in the county where the petitioned is filed if there is no court in said county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the child concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and such parent shall be summoned to appear in accordance with G.S. 7A-289.27.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing; but the court may cause summons to be issued to any person directing him to appear and testify.

(d) If the court is unable to ascertain the name or identify of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the child to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designated the court in which the petition is pending:

(2) Be directed to "the father (mother)(father and mother) of a male (female) child on or about _____ (date) in _____ County _____ (City) (State) respondent";

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);
(4) State that a petition seeking to terminate the parental rights of the respondents has been filed;
(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice, and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j)(9)(c); and
(6) State that the respondent's parental rights to the child will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

§ **7A-289.27. Issuance of summons.** — Except as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued, directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the child;
(2) Any person who has been judicially appointed as guardian of the person of the child;
(3) The custodian of the child appointed by a court of competent jurisdiction;
(4) Any county department of social services or licensed child-placing agency to whom a child has been released by one parent pursuant to G.S. 48-9(a)(1); and
(5) The child, if he or she is 12 years of age or older at the time the petition is filed.

Provided, no summons need be directed to or served upon any parent who has previously surrendered the child to a county department of social services or licensed child-placing agency, nor to any parent who has consented to the adoption of the child by the petitioner. The summons shall notify the respondents to file written answer within 30 days after service of the summons and petition and that if the respondents fail to answer, the petitioner will apply to the court for the relief prayed for in the petition. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j); but the parent of the child shall not be deemed to be under disability even though such parent is a minor. (1977, c. 879, s. 8.)

§ **7A-289.28. Failure of respondents to answer.** — Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within 30 days from the date of first publication if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition. (1977, c. 879, s. 8.)

§ **7A-289.29. Answer of respondents.** — (a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the the name and address of the answering respondents or his or her attorney.

(b) If an answer denies any material allegation of the petition, the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The court shall conduct a special hear-

ing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8.)

§7A-289.30. Adjudicatory hearing on termination. – (a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based upon a preponderance of the evidence. No husband-wife or

physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8.)

§7A-289.31. Disposition. – (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

(b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition, making appropriate findings of fact and conclusions.

(d) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8.)

§7A-289.32. Grounds for terminating parental rights. – The court may terminate the parental rights upon a finding of one or more the following:

(1) The parent has without cause failed to establish or maintain concern or responsibility as to the child's welfare.

(2) The parent has physically abused or neglected the child. The child shall be deemed to be physically

abused or neglected if the court finds the child to be an abused child whithin the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:

a. Established paternity judicially or by affidavit; or
b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or
c. Legitimated the child by marriage to the mother of the child; or
d. Provided substantial financial support or consistent care with respect to the child and mother. (1977, c. 879, s. 8.)

§7A-289.33. Effects of termination order. — An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

(1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the child in the custody of the petitioner, or some other suitable person, or in the custody of the Department of Social Services or licensed child-placing agency, as may appear to be in the best interest of the child. (1977, c. 879, s. 8.)

§7A-289.34. Appeals: modification of order after affirmation. — Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. Upon the affirmation of the order of adjudication or disposition of the district court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of such an appeal, the district court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interest of the child to reflect any adjustment made by the child or change in circumstances during the period of time the case on appeal was pending, provided that if such modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why said modifying order should be vacated or altered. (1977, c. 879, s. 8.)

APPENDIX C

The questionnaire sent to each of the one hundred counties on November 7, 1980 is as follows:

Name of County _____

1. What type of legal representation does your agency have?
   (a) _____full time or in house counsel representing agency in all legal matters
   (b) _____representation by counsel only in certain types of matters
      (1) ____child custody proceedings
      (2) ____terminations of parental rights
      (3) ____adult protective services
      (4) ____fraud
      (5) ____child support
      (6) ____administrative matters

2. Has your agency presented any termination of parental rights cases in Court since October 1, 1977, *without* benefit of counsel, and if so, how many?

3. Do your Juvenile Court Judges now appoint counsel to represent indigent parents in termination proceedings by extending the authority to appoint counsel in abuse, neglect and dependency proceedings granted by G.S. §7A-587 of the New Juvenile Code, effective January 1, 1980?

4. How many termination of parental rights cases has your agency successfully presented to the Court since

the effective date of the present termination of parental rights law, October 1, 1977?

(a) In how many of these were the parent or parents represented by counsel?

5. How many termination of parental rights petitions have your Juvenile Court Judges dismissed pursuant to G.S. §7A-289.31(b) as not being in the best interests of the child irrespective of the existence of one or more grounds for termination?

(a) In how many of these were the parent or parents represented by counsel?

6. How many of your termination of parental rights cases have been dismissed pursuant to G.S. §7A-289.31(c) because grounds for termination did not exist?

(a) In how many of these were the parent or parents represented by counsel?

7. Do your Juvenile Court Judges routinely appoint guardians ad litem for the juveniles in termination of parental rights proceedings?

8. If you have any special comments that you feel may be helpful, but not addressed in the answers to the questions above, please elucidate.

For the purposes of discussion of the information received as a result of this questionnaire only the statistics related to questions 2, 4, 4(a), 5, 5(a), 6, and 6(a) are included in the following table.

It should be noted that the information from Gaston, Guilford, and Forsyth counties was provided by telephone rather than in written responses to the questionnaire.

THE INDIVIDUAL RESPONSES OTHER THAN THOSE FROM GUILFORD, GASTON, AND FORSYTH COUNTIES WERE SENT TO COUNSEL FOR THE PETITIONER AND AMICI ON DECEMBER 9, 1980 FOR THEIR USE AND EVALUATION.

COUNTY	Terminations Presented Without Benefit of Counsel To Agency	Successful Termination Cases Presented	In How Many Parents Represented	Terminations Dismissed Irrespective of Grounds	In How Many Parents Represented	Terminations Dismissed For Lack of Grounds	In How Many Parents Represented
Alexander	none	7	2	1	1	0	0
Alleghany	no	1	0	0	0	0	0
Anson	no	0	0	0	0	0	0
Beaufort	no	8	0	1	0	0	0
Bertie	no	4	0	0	0	0	0
Bladen	no	0	0	0	0	0	0
Brunswick	yes (number not reported)	4	0	0	0	0	0
Buncombe	no	19	8	0	0	0	0
Burke	yes (32 cases)	33	4	0	0	0	0
Cabarrus	no	6	3	0	0	0	0
Caswell	no	3	0	0	0	0	0
Catawba	no	22	4	0	0	0	0
Chowan	no	0	0	0	0	0	0
Clay	no	0	0	0	0	0	0
Cleveland	no	2	0	0	0	0	0
Cumberland	no	90	0	0	0	0	0
Currituck	no	0	0	0	0	0	0
Dare	no	2	0	0	0	0	0
Davie	no	1	0	0	0	0	0
Durham	no	16	4	0	0	0	0
Edgecombe	no	11	0	0	0	0	0
Forsyth	no	30	3	0	0	0	0
Gaston	no	24	1	0	0	0	0
Graham	no	0	0	0	0	0	0
Greene	no	0	0	0	0	0	0
Guilford	no	70	24	0	0	0	0
Halifax	no	10	0	0	0	0	0
Harnett	no	7	2	0	0	0	0
Haywood	no	0	0	0	0	0	0

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COUNTY	Terminations Presented Without Benefit of Counsel To Agency	Successful Termination Cases Presented	In How Many Parents Represented	Terminations Dismissed Irrespective of Grounds	In How Many Parents Represented	Terminations Dismissed For Lack of Grounds	In How Many Parents Represented
Hertford	no	1	1	0	0	0	0
Hoke	no	0	0	0	0	0	0
Hyde	no	0	0	0	0	0	0
Jackson	no	0	0	0	0	0	0
Jones	no	0	0	0	0	0	0
Lee	no	4	4	0	0	0	0
Lenoir	no	2	0	0	0	0	0
Macon	no	0	0	0	0	0	0
Madison	no	4	1	0	0	0	0
Martin	yes (2 cases)	11	0	0	0	0	0
McDowell	no	4	0	0	0	0	0
Mecklenburg	no	123	19*	2	2	1	1
Mitchell	no	1	0	0	0	0	0
Montgomery	no	2	0	0	0	0	0
Moore	no	7	0	0	0	0	0
Nash	no	14	0	0	0	0	0
New Hanover	no	4	0	0	0	0	0
Northampton	no	0	0	0	0	0	0
Pamlico	no	0	0	0	0	0	0
Passquotank	no	0	0	0	0	0	0
Perquimans	no	0	0	0	0	0	0
Person	no	2	0	0	0	0	0
Pitt	no	8	0	0	0	0	0
Randolph	no	16	0	0	0	0	0
Richmond	no	5	1	0	0	0	0
Robeson	no	16	0	0	0	0	0

* Mecklenburg reported that in 10-15% of the cases the parents were represented. This per cent figure is commensurate with the figure (16%) computed on the basis of actual numbers reported by the remaining counties. Therefore, the number 19 reflects 15% of all cases reported in Mecklenburg County.

COUNTY	Terminations Presented Without Benefit of Counsel To Agency	Successful Termination Cases Presented	In How Many Parents Represented	Terminations Dismissed Irrespective of Grounds	In How Many Parents Represented	Terminations Dismissed For Lack of Grounds	In How Many Parents Represented
Rockingham	yes (4 cases)	26	4	1	1	0	0
Rowan	no	40	15	0	0	0	0
Rutherford	no	6	1	0	0	0	0
Sampson	no	15	0	0	0	1	1
Scotland	no	11	2	0	0	0	0
Stanly	no	1	0	0	0	0	0
Stokes	no	0	0	0	0	0	0
Surry	no	1	0	0	0	0	0
Swain	no	0	0	0	0	0	0
Transylvania	no	7	4	0	0	0	0
Union	no	4	4	1	1	0	0
Vance	no	0	0	0	0	0	0
Wake	no	18	1	0	0	0	0
Washington	no	1	1	0	0	0	0
Watauga	no	16	4	0	0	0	0
Wayne	no	12	3	0	0	0	0
Wilson	no	4	0	0	0	0	0
Yadkin	yes (4 cases)	4	0	0	0	0	0
TOTALS		760	120	6	5	2	2

No. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER, *Petitioner,*

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

**On Writ Of Certiorari To The
North Carolina Court Of Appeals**

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER, *Petitioner,*

v.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

**On Writ Of Certiorari To The
North Carolina Court Of Appeals**

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. The Writ of Certiorari Should Not Be Dismissed as Improvidently Granted.

In his brief[1] respondent notes that petitioner did not ask the trial court to appoint an attorney on her behalf and, on this single factual predicate, belatedly asserts[2] that certiorari was improvidently granted. Although the precise contours of respondent's contention are unclear, he appears to be making two separate arguments. First, he seems to suggest that by failing to ask the trial court to appoint counsel on her behalf, petitioner has effectively waived that right. Second, he asserts that in the absence of an outright request to appoint counsel at

[1] Brief for Respondent, pp. 7-10.

[2] Respondent never raised this issue either in his answer to the Petition for Discretionary Review to the North Carolina Supreme Court (J.A. 26-7) or in his Brief in Opposition to Petitioner's Petition for a Writ of Certiorari in this Court. Nor has he at any time filed a motion in this Court to dismiss certiorari as improvidently granted.

the trial level, petitioner's constitutional entitlement to court-appointed counsel is not properly before this Court. Petitioner will discuss each of these assertions *seriatim* and demonstrate that each is without merit.

This Court has frequently stated that it will, ". . . not presume acquiesence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292, 307 (1937). In the civil, as well as in the criminal area, this Court has repeatedly indicated that courts must indulge every reasonable presumption against waivers of fundamental rights. *Fuentes v. Shevin,* 407 U.S. 67, n. 31, 94 (1972); *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1937). As this Court stated in *Brady v. United States,* 397 U.S. 742 (1970),

> Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Id. at 748.

Applying these principles in the context of an accused's right to counsel, this Court has consistently refused to presume waiver of the right to counsel based upon a defendant's failure to request appointment of counsel. Over forty years ago this Court stated:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

Carnley v. Cochran, 369 U.S. 506 (1962), is analogous to the case at bench in that petitioner therein never requested appointment of counsel, nor did the trial court offer to appoint counsel on his behalf. In *Carnley* this Court rejected the argu-

ment that petitioner had implicitly waived his right to counsel in language which applies equally to the case at bench.

> But it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request.
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> * * * *
>
> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not wavier.

Id. at 513, 516.

Similarly, in *Kitchens v. Smith,* 401 U.S. 847 (1971), although petitioner had not testified at the habeas corpus hearing that he had wanted a lawyer, had asked for one, or had made any effort to find one, this Court relied on *Carnley v. Cochran, supra,* in holding that petitioner had not waived his right to counsel.

The basic principle which emerges from the above-cited authority is that a defendant's failure to ask the court to appoint counsel to represent him is not an effective waiver of his right to counsel in the absence of a clear showing that counsel was offered to him, and that he intelligently and understandably rejected the offer. By parity of reasoning, unless a parent who is the subject of a termination of parental rights proceeding is offered the assistance of counsel and voluntarily, intelligently, and competently waives her right to an attorney, counsel must be appointed to represent her if she is indigent.[3] *See also In re Gault,* 387 U.S. 1, 41-2 (1967); *McNeal v. Culver,* 365 U.S. 109

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[3] The right of indigent parents to court-appointed counsel in a termination case necessarily entails the right to court-appointed counsel at all "critical" stages of the proceeding. *Accord, Coleman v. Alabama,* 399 U.S. 1 (1970). This would include all pre-adjudication and dispositional hearings. *See* IJA-ABA Juvenile Justice Standards Project, *Standards Relating to Counsel for Private Parties,* Commentary to Standard 2.3(b) (1980). In order to avoid

n.1, 111 (1961); *Uveges v. Pennsylvania,* 335 U.S. 437, 441 (1948).

The record in the present case indicates that at no point prior to the termination hearing did the judge, or anyone else, advise petitioner of her right to counsel or offer to appoint counsel on her behalf.[4] Without being advised of her absolute right to be represented by counsel, petitioner's ignorance of possible sources of legal representation cannot be translated into an intentional relinquishment of a known right. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

Respondent's assertion that petitioner did not properly raise her entitlement to counsel below must also be rejected as specious. In complying with Rule 10 of the North Carolina Rules of Appellate Procedure, petitioner filed as an assignment of error in the district court the court's failure to appoint counsel to represent her as required under the Fourteenth Amendment to the United States Constitution. (J.A. 15) Petitioner briefed this issue in the North Carolina Court of Appeals. The Court of Appeals reached the merits of the case and specifically found that it is not compelled, ". . . to hold that appointment of counsel for indigent parents is constitutionally

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uninformed or unknowing waivers of the right to counsel, and to provide counsel with adequate time to prepare his case, petitioner urges this Court to adopt the holdings of the District Court and the Court of Appeals in *Davis v. Page,* 442 F.Supp. 258 (S.D. Fla. 1977), *affd.* 618 F.2d 374 (5th Cir. 1980), *rehear. en banc granted,* that parents be advised of their right to counsel, if indigent, immediately upon filing of the petition, and that no waiver of the right to counsel will be effective unless the trial judge has determined, on the record, that such waiver is knowing and intelligent. 442 F.Supp. at 265; 618 F.2d at 386.

[4] After the court sustained the petition, and petitioner indicated that she wished to appeal, the court advised her that if she could not afford an attorney, she might seek an attorney from the North Central Legal Assistance Program. (RT 62) However, the court never advised her of the possibility of obtaining counsel from the North Central Legal Assistance Program, or from any other legal services office, prior to the termination of parental rights hearing.

mandated." (J.A. 23) Likewise, both petitioner's Notice of Appeal and Petition to the Supreme Court of North Carolina for Discretionary Review were based on the trial court's alleged constitutional error in failing to appoint counsel to represent petitioner. (J.A. 24-5)

Under these circumstances, it is difficult to comprehend the basis for respondent's contention that the constitutional issue of petitioner's right to counsel was not properly preserved. When a state appellate court assumes or holds that a federal question was properly raised, and proceeds to consider it on the merits, this Court will presume that the issue is properly before it. *Coleman v. Alabama,* 377 U.S. 129, 133 (1967); *Whitney v. California,* 274 U.S. 357, 360-61 (1927). In fact, even when an appellant has failed to argue a constitutional issue below, this Court will rule upon the issue as long as the state supreme court has reached and decided it. *Jenkins v. Georgia,* 418 U.S. 153 (1974); *see Raley v. Ohio,* 360 U.S. 423, 436 (1959).

In the case at bench the North Carolina Court of Appeals held that petitioner did not possess a constitutionally guaranteed right to counsel in a termination of parental rights proceeding. Since the constitutional issue was properly raised in the papers before the North Carolina Supreme Court, it must be presumed that the North Carolina Supreme Court reached the merits of petitioner's constitutional claim in dismissing her appeal. *See Falls Sales Co. v. Board of Transportation,* 292 N.C. 437, 233 S.E.2d 569 (1977). Since the constitutional question was raised in both state appellate courts, and is the subject of one state court appellate opinion which reached the merits of petitioner's contention, the issue is properly before this Court.

II. Appendix C To Respondent's Brief Strongly Supports Petitioner's Contention That Without Representation by Counsel the Risk of Erroneous or Inappropriate Terminations of Parental Rights is Considerably Enhanced.

Respondent has annexed to his brief as Appendix C the

questions and a compilation of the answers from a survey which he claims was mailed to each of the one hundred counties in North Carolina during November of 1980. Although the practice of bolstering one's case by surveys conducted after the granting of certiorari seems, at the least, highly questionable,[5] petitioner does not object to use of the questionnaire results in this case because they clearly support the reasons presented in Petitioner's Brief why appointment of counsel for indigent parents is essential to vouchsafe due process.

The survey results indicate that out of 768 termination cases over approximately a three year period, parents were represented by counsel in 120 cases (15.6%). The actual questionnaire responses, which are only summarized in Appendix C,[6] demonstrate that in some counties counsel is actually appointed by the court, whereas in other counties parents are able to secure assistance from the local legal services or legal aid programs. The questionnaire results, therefore, confirm the capriciousness of North Carolina's present policy concerning appointment of counsel in termination cases. In the majority of counties counsel is simply not available to represent indigent parents. A parent's ability to gain representation will turn upon the wholly fortuitous circumstance of whether she resides in one of the few counties where a judge is willing to appoint counsel to represent her, or whether the local legal services program is willing and able to represent her and she is made aware of this source of possible representation.[7] A

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[5] The questionnaire results are obviously not part of the record on appeal; nor has respondent urged that this Court could properly take judicial notice of the results of such a questionnaire.

[6] Respondent mailed the individual responses to counsel for petitioner and *amici* on December 9, 1980. Brief for Respondent, Appendix C at 27a.

[7] There are an insufficient number of legal services attorneys to meet all of the legal needs of their clients. G. Bellow, *Legal Aid in the United States*, 14 Clearinghouse Rev. 337 (July 1980). *See* Brief for *Amicus Curiae*, National Legal Aid and Defender Association, 23-4. As a result, most legal

parent's ability to safeguard her fundamental right to family integrity should not depend upon the fortuity of local practice and availability of counsel.

Respondent notes that only seven of 127 cases (5.5%) where parents were represented by counsel resulted in dismissal of petitions. From these figures he infers that it is unlikely that many of the 640 petitions sustained where parents were unrepresented by counsel would have been dismissed if attorneys had been provided to these parents.[8]

One problem with respondent's conclusion is that it is based upon insufficient statistical information. As respondent concedes in his brief,[9] many counties reported that most of their termination proceedings were uncontested — being brought against absent fathers or parents who failed to respond. Unless we can be certain — which is not indicated in the questionnaire results — that counsel is never appointed for a parent in an uncontested case, it is impossible to determine the percentage of contested cases where parents, represented by counsel, were able to prevail.[10]

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services programs have adopted methods for reduction of intake by—for example—refusing to handle certain types of cases (*e.g.* family law matters), or by limiting the number of cases they will handle, or the hours or days of the week during which they will interview new clients. *See, e.g.* Arango, *Planning for Legal Services Projects: Concepts, Experiences, and Issues,* 12 Clearinghouse Rev. 163 (July 1978); E. Metzner, *Too Many Clients, Too Little Time* (N.L.A.D.A. 1974).

[8] Respondent's Brief, pp. 38-9.

[9] *Id.* at 39.

[10] Moreover, respondent assumes that all cases where termination petitions were sustained are correctly decided. Since North Carolina law does not guarantee the right of an indigent parent to be represented by counsel on appeal, nor even the right to be notified of her right to appeal an adverse ruling [see N.C. Gen. Stat. §7A-289.34 (Cum. Supp. 1979)], it is reasonable to assume that many errors at the trial level remain undetected. Cf. *Douglas v. California,* 372 U.S. 353 (1963). With provision of counsel, one would anticipate an increase in the number of appeals, and a concomitant improvement in the quality of procedural regularity at the trial level.

Accepting *arguendo* the accuracy and utility of the figures in Appendix C to Respondent's Brief, these statistics, in any event, confirm the necessity for appointing counsel for indigent parents. In seven out of the eight cases where petitions were not sustained (87.5%), parents were represented by counsel. In only 120 of the 760 cases where petitions were sustained (15.8%) were parents represented by counsel. More significantly, perhaps, while petitions were dismissed in 5.5% of the cases where parents were represented by counsel (7 of 127), petitions were dismissed in only 0.15% of the cases where parents were unrepresented by counsel (1 out of 641). Statistically, a parent had a thirty-six times greater chance of prevailing in a termination proceeding if she was represented by counsel than if she was unrepresented.[11] The statistical discrepancy in the results where parents are, and are not, represented by counsel confirms the crucial role which attorneys can, and do, play in North Carolina in preventing unfounded and inappropriate terminations of parental rights.

III. Termination of Parental Rights Proceedings Do Directly Implicate Fundamental Rights Worthy of the Highest Degree of Constitutional Protection.

Respondent acknowledges that a parent's fundamental right to the care and custody of her children is directly implicated in an abuse, neglect, or dependency proceeding. How-

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[11] It is also interesting to note that only five of the seventy-three counties responding to respondent's survey reported that termination proceedings are *ever* brought to court by a social services agency which is unrepresented by counsel. It is possible that counsel was not sought by the social services agencies in those five counties primarily in uncontested cases, although this is not entirely clear from the survey answers. In any event, the prevailing practice throughout almost all counties in North Carolina is for the county department of social services to be represented by counsel in termination cases—thereby exacerbating the gross inherent imbalance of expertise between the governmental litigant and the unrepresented parents. *See, In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 290 (1972); *In re Welfare of Luscier*, 84 Wash.2d 135, 524 P.2d 906, 908 (1974); *In re Adoption of R.I.*, 312 A.2d 601, 602-03 (S.Ct. of Pa. 1973).

ever, respondent asserts that once a juvenile court has removed custody of a child from a parent in an abuse or neglect case, the parent's interest in her child becomes qualified, conditional, and less worthy of full due process protection. [12]

Respondent's argument misconceives crucial differences between neglect and abuse cases and proceedings to terminate parental rights. Under North Carolina law the primary goals of abuse and neglect proceedings are to protect the child while preserving the child's ties to his parents to the maximum, feasible extent. N.C. Gen. Stat. §§ 7A-516, 7A-544, 7A-586, 7A-647, 7A-657. As discussed in the Brief of *Amicus Curiae,* the State of North Carolina, [13] many abuse or neglect proceedings result in the child being left in his parents' home under the supervision of the department of social services. If custody is removed, the social services department must work towards restoration of the child with his parents. Only if family reunification should prove unfeasible will termination of parental rights be attempted. *Id.* at 13-16. [14]

Thus, it is misleading to equate the parents' custodial rights at stake in a dependency or neglect proceeding with parental rights which are at peril in a proceeding to terminate parental rights. If an abuse or neglect petition is sustained, it may — or may not — lead to a temporary removal of the child from his parents' custody. However, even when custody is removed, the juvenile court is mandated to conduct a review hearing within six months of the initial dispositional order to find out

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[12] Brief for Respondent, p. 33.

[13] *Id.*, pp. 13-17.

[14] "When the relationships essential to the child's well-being and self-worth are threatened or destroyed, first and continuing efforts should be directed toward increasing or restoring family unity. . . . In order to permit a child's early return to his family, it is necessary to try to increase the strengths of his family. Permanent separation of a child from his family should be determined as quickly and soundly as possible." 1 Family Services Manual, c. IV, 1200 (Rev. 75), cited in Brief for the State of North Carolina, *Amicus Curiae,* n. 43 at 16.

what services have been offered to reunite the family and whether family reunification is possible. N.C. Gen. Stat. §7A-657.

The purpose of a termination of parental rights proceeding is to sever entirely the parent-child relationship. An order terminating parental rights, ". . . completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent" except for the child's right of inheritance which is terminated at such time as the child is adopted. N.C. Gen. Stat. §7A-289.33. While abuse or neglect proceedings involve infringements upon parents' custodial rights, in termination of parental rights cases, "the parent loses not only physical custody but also the right to ever regain custody." Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stan. L. Rev. 623, 633 (April 1976). In addition, termination extinguishes other aspects of the parent-child relationship which may be of significant concern to both parent and child. These include the parent's duty to support the child, the right of both parents and child to visit each other, the parent's right to authorize medical care and to withhold consent to adoption, and — at least in some jurisdictions — the child's right to inherit intestate from his parents. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* XXXIX Law and Contemporary Problems 226, 245 (Summer 1975).[15]

In *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), this Court recognized that a parent's liberty interest in family integrity derives from three sources: blood relation-

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[15] Other significant rights may also be affected by an order terminating parental rights. In the case at bench, for example, the termination order effectively abolishes the child's right to maintain a relationship with his grandmother and siblings. In neglect and abuse cases, visitation by parents, siblings, and grandparents is usually permitted unless contrary to the best interests of the child.

ship, state-law sanction, and intrinsic human rights. *Id.* at 845-46. Whatever the source of the constitutionally protected interest may be, it is evident that an order terminating parental rights — unlike a neglect adjudication — obliterates the legal basis for the very existence of the parent-child relationship.[16] Hence, respondent is simply wrong in suggesting that parental rights implicated in termination proceedings are qualified or conditional. Since the continued existence of the parent-child relationship is at stake, the highest degree of constitutional protection is compelled. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972).

IV. The Right of an Indigent Parent to Court-Appointed Counsel in a Termination of Parental Rights Case Must Be Given Retroactive Effect, At Least When There Has Not Been a Completed Adoption.

Amicus Curiae, the State of North Carolina, argues that if the Court holds that indigent parents in termination of parental rights cases do enjoy a constitutional right to court-appointed counsel, the Court's decision should be given prospective application only.[17] This Court has generally preferred not to consider the retroactivity of its decisions overruling prior precedent, or creating newly fashioned rules of procedure, until confronted by cases which squarely raise the retrospective application of the new rule or decision. *Compare Mapp v. Ohio*, 367 U.S. 643 (1961), *with Linkletter v. Walker*, 381 U.S. 618 (1965); *Duncan v. Louisiana*, 391 U.S. 145 (1968), *with Destefano v. Woods*, 392 U.S. 631 (1968). Nevertheless, should this Court decide to reach the retroactivity

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[16] It should also be recognized that under North Carolina law physical abuse or neglect can be a basis for terminating parental rights, and there is no statutory requirement of a prior adjudication in a neglect or abuse proceeding. N.C. Gen. Stat. §7A-289.31(2). It is difficult to understand the rationale of respondent's position that a parent should be entitled to representation in an abuse proceeding but not in a termination of parental rights case based upon allegations of abuse.

[17] Brief of *Amicus Curiae*, pp. 23-5.

issue in this case, this Court's case law strongly supports retroactive application of a decision to require court-appointed counsel for indigent parents in termination of parental rights proceedings.

In arguing in favor of prospective application of any decision requiring provision of counsel, *Amicus* assumes that the criteria articulated in *Linkletter v. Walker*, 381 U.S. 618 (1965), and frequently reiterated by this Court in subsequent decisions,[18] provide the applicable guidelines. *Amicus* analyzes the present case in light of these threefold criteria and concludes that a right to appointed counsel for indigent parents should be limited to cases brought *in futuro*.

The problem with *Amicus*' analysis is that it fails to recognize that this Court has applied a different standard in determining the retroactivity of new constitutional rulings which go to the integrity of the fact-finding process. Where a new constitutional rule is primarily concerned with improving the fairness of the adjudicatory process, this Court has consistently given such rulings retroactive effect.[19] These decisions recognize that the *Linkletter-Stovall* criteria are simply inapplicable

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[18] In *Stoval v. Denno*, 388 U.S. 293 (1967), this Court summarized the *Linkletter* criteria for determining the retroactivity of new constitutional standards as, "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297.

[19] *See, e.g. Brown v. Louisiana*, 100 S.Ct. 2214 (1980) [*Burch v. Louisiana*, 441 U.S. 130 (1979), holding unconstitutional the Louisiana practice of sanctioning convictions for non-petty offenses by a non-unanimous jury of six, applied retroactively]; *Hankerson v. North Carolina*, 432 U.S. 233 (1977) [*Mullaney v. Wilbur*, 421 U.S. 684 (1975), requiring the state to establish all elements of a criminal offense beyond a reasonable doubt applied retroactively]; *Ivan V. v. City of New York*, 407 U.S. 203 (1972) [*In re Winship*, 397 U.S. 258 (1972), requiring standard of proof beyond a reasonable doubt in juvenile delinquency trial, held retroactive]; *Roberts v. Russell*, 392 U.S. 293 (1968) [giving retroactive effect to *Bruton v. United States*, 391 U.S. 123 (1968)]; *Jackson v. Denno*, 378 U.S. 368 (1964).

when the decision in question impacts upon the fundamental fairness of the trial. *See, e.g., Brown v. Louisiana, supra*, at 2223; *United States v. United States Coin and Currency*, 401 U.S. 715, 723 (1971); *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968). As this Court stated in *Williams v. U.S.*, 401 U.S. 646 (1971):

> Where the major purpose of a new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. [Citations omitted.] Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.

Id. at 653.

Perhaps no other constitutional guarantee has been so widely recognized as crucial to the accurate development of the facts at trial as the right to counsel. Without representation by counsel, the likelihood of error—either through the failure to exclude inadmissible or prejudicial evidence, to elicit bias or inaccuracies on cross-examination, or as a result of the accused's inability to marshall and introduce evidence supportive of his defense—is unacceptably high.[20] For these reasons this Court has repeatedly ruled that constitutional decisions extending the right to counsel to previously unrecognized stages of the criminal process must be accorded retroactive effect.[21]

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[20] These arguments were developed more extensively in Petitioner's Brief, pp. 27-36.

[21] *Berry v. Cincinnati*, 414 U.S. 29 (1973) [*Argersingr v. Hamlin*, 407 U.S. 25 (1972), extending the right to counsel to misdemeanor offenses for which the accused may be imprisoned, applied retroactively]; *Kitchens v. Smith*, 401 U.S. 847 (1971) [recognizing that *Gideon v. Wainwright*, 372 U.S. 335 (1963), is retroactive]; *Arsenault v. Commonwealth of Massachusetts*, 393 U.S. 5 (1968) [*White v. Maryland*, 373 U.S. 59 (1963), holding that

Since criminal law decisions extending the right to counsel to arraignments, preliminary hearings, or sentencing are applied retroactively, *a fortiori* the right to counsel at the adjudicatory or trial stage of a termination of parental rights proceeding must be given retroactive effect.[22] For the reasons discussed in Petitioner's Brief, representation by counsel is as critical to the full and unfettered development of the facts at a termination of parental rights hearing as at a criminal trial. Under the previously cited precedent holding retroactive the right to counsel and other due process protections which safeguard the fact-finding process, a parent's right to counsel in a termination of parental rights proceeding must similarly be accorded retrospective effect.

However, *Amicus* also argues that a parent's right to counsel should not be given retroactive application because the impact of such a ruling would be to upset numerous finalized adoptions.[23] Petitioner must acknowledge that where there has been a completed adoption, a significant competing interest exists which would impact upon a decision in favor of, or against, retroactivity: namely, the interest of the child and the adoptive parents in maintaining the autonomy of the adoptive family. However, since respondent has advised the Court that no adoption has been undertaken in the case at bench,[24] it is clearly unnecessary for the Court to reach the issue of the

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there is a right to counsel when an accused pleads guilty at a preliminary hearing, must be applied retroactively]; *McConnell v. Rhay*, 393 U.S. 2 (1968) [court's decision in *Mempa v. Rhay*, 389 U.S. 128 (1967)—that there is a right to counsel at a deferred sentence proceeding—given retroactive effect]; *White v. Maryland*, 373 U.S. 59 (1963) [right to counsel at arraignment hearing established in *Hamilton v. Alabama*, 368 U.S. 52 (1961), applied retroactively].

[22] In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court noted that no distinction has been drawn in retroactivity litigation between civil and criminal cases. *Id.* at 627.

[23] Brief for *Amicus Curiae*, The State of North Carolina, p. 25.

[24] Brief for Respondent, n. 22, p. 36.

retroactivity of a parent's right to counsel in those cases where there has been a finalized adoption.[25]

In *Armstrong v. Manzo*, 380 U.S. 54 (1965), this Court vacated an adoption decree because there was a due process violation in failing to give notice of the adoption proceeding to the child's father. State courts have generally been reluctant to vacate adoptions in the absence of fraud, undue influence, lack of consent or notice. *See generally* 2 C.J.S. *Adoptions* §§113-18 (1972). Where there has been a due process violation, such as denial of the right to notice of the adoption proceeding, some state courts have vacated finalized adoptions. *See, e.g., Blankenship v. Blankenship*, 267 S.E.2d 751 (W.Va. 1980); *Matter of Anderson*, 589 P.2d 957 (Idaho 1979); *Schrum v. Bolding*, 539 S.W.2d 415 (Ark. 1976).

Petitioner believes that it would be singularly inappropriate, in the context of the present case, for this Court to decide the retroactive effect on completed adoptions of any decision in favor of parents' right to counsel in termination of parental rights proceedings. No statistical information has been adduced by *Amicus* as to the number of adoptions which would be affected by a ruling in favor of retroactivity. As previously noted, this issue is not presented in the case at bench since petitioner's son has not been adopted. Moreover, in this sensitive area it may be best to proceed with caution and avoid an absolute rule. There are a multitude of factors which can militate more or less strongly in favor of insulating the adoption from attack.[26] It may be that in determining whether to

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[25] Of Course, a decision to give retroactive effect to the parent's constitutional right to counsel does not necessarily mean that children affected by the Court's decision will be removed from their foster parents. The parents will simply be entitled to new termination of parental rights hearings at which they will have the right to be represented by counsel.

[26] For example, courts are much more likely to permit parents to revoke consent to adoptions within a few weeks or months of giving consent than where the adoption has been finalized for years. *See, e.g., Matter of Anderson*, 99 Idaho 805, 589 P.2d 957 (1979); *Small v. Andrews*, 20 Or. App. 6, 530 P.2d 540 (1975).

vacate completed adoptions because the parents were unrepresented by counsel in prior termination of parental rights proceedings, state courts will have to consider the impact of upsetting such adoptions on a case-by-case basis.

Where—as here—there has been no finalized adoption, the governing principle is well-established in this Court's jurisprudence. If this Court reaches the issue, maintenance of the integrity of the fact-finding process compels retroactive application of a decision in favor of affording indigent parents the right to counsel in proceedings to terminate their parental rights.

CONCLUSION

For the above-stated reasons, and the reasons contained in Petitioner's Brief, the judgment and order of the North Carolina Court of Appeals must be reversed and remanded with directions to grant petitioner a new hearing at which she shall be furnished court-appointed counsel.

Respectfully submitted,
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NOV 20 1980

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IN THE

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BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

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QUESTION PRESENTED BY AMICUS

Whether the Fourteenth Amendment Due Process Clause requires that indigent parents be afforded counsel in proceedings to terminate their parental rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-6423

ABBY GAIL LASSITER,
Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF
DURHAM COUNTY, NORTH CAROLINA
Respondent.

On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF OF THE AMERICAN BAR ASSOCIATION AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Bar Association is a voluntary, national membership organization of the legal profession. Its more than 260,000 members come from every state, territory, and the District of Columbia. Since its inception over 100 years ago, the Association has taken an active interest in the improvement of the administration of justice and the judicial process.

As part of its activities to strengthen the legal system, the Association has issued several sets of comprehensive standards. These cover the juvenile justice system, the criminal justice system, and judicial administration. These Standards all address, in some degree, the basic issue which now appears before the Court. The *Juvenile Justice Standards*, in particular, enunciate the Association's views on the principles of law presented in this *amicus curiae* brief. The Standards, adopted in February of 1979 by the Association's House of Delegates, represent eight years of research, drafting, and critiquing under the aegis of a Joint Commission of the American Bar Association and the Institute of Judicial Administration. They reflect the work of hundreds of contributors, including lawyers, judges, and recognized experts in related fields such as social work, psychology, education, sociology, psychiatry, corrections, law enforcement and health care.

The Association's interest, however, goes beyond its efforts to articulate standards. The procedural principle at issue in this case touches upon key facets of the legal profession's role and responsibilities in relation to indigent defendants. As the national association of the legal profession, with a membership exceeding one out of every two practicing lawyers, the outcome will have a tangible impact on the work and professional practice of thousands of our members. It will, in certain respects, define or alter the professional duties to which the law and various codes of professional responsibility hold us accountable.

The members of the Association's Family Law, Criminal Justice, and Individual Rights and Responsibilities Sections, as well as its Young Lawyers Division, have accorded special attention to the nation's family and juvenile court systems. Moreover, the Association's Young Lawyers Division sponsors a National Legal Resource

Center for Child Advocacy and Protection. This Center focuses on many of the legal problems indicated by the case.

The Association, with the written consent of the parties,[1] respectfully sets forth its views herein on the important question of whether indigent parents are entitled to counsel in cases to terminate their parental rights.

SUMMARY OF THE ARGUMENT

This Court has consistently recognized that the liberty interest of parents in the preservation, integrity and protection of the family commands constitutional protections against undue state interference. State imposed termination of parental rights is an extreme deprivation of a basic human right; it permanently dissolves all rights, duties and pleasures derived from the parent-child relationship. Yet, notwithstanding the importance of this relationship and the severe consequences of its severance, studies have demonstrated that proceedings to involuntarily terminate the parent-child relationship are prone to error. According to these studies, this error arises from several characteristics common to termination proceedings, including:

—the lack of uniform judicial criteria,

—the subjective nature of decisions,

—misplaced reliance on overworked and ill-trained social service workers, and

—failure of state agencies to provide rehabilitation services to families under their investigation.

In order to minimize these factors and ensure a fair hearing, procedural due process demands that counsel be

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[1] Copies of letters indicating the parties' consent have been filed with the Clerk of the Court.

made available to parents, and that if the parents are indigent, it be at public expense. Counsel's crucial role in these matters is evidenced by studies which contrasted the dispositions between parents with and without counsel in termination proceedings: the represented parents had far greater success in maintaining the vital parent-child relationship.

Furthermore, the additional cost of providing counsel in these proceedings should be small. Already, by legislation or court decision, a majority of the states provide indigent parents with counsel in involuntary termination of parental rights proceedings. In the remaining jurisdictions, the available statistical data suggests that these cases comprise a minute portion of a state's judicial caseload, often one or two percent of the total criminal docket. Under these circumstances, a state's assertion of budgetary considerations must succumb to the parents' liberty interest in the continued relationship with their children.

ARGUMENT

I. THE RIGHT OF PARENTS TO A CONTINUED RELATIONSHIP WITH THEIR CHIDREN IS A LIBERTY INTEREST PROTECTED BY THE CONSTITUTION.

Over the past 60 years, the Court has had frequent opportunity to scrutinize state intervention into family matters. On each occasion the Court has zealously guarded familial relationships and integrity, according them protections under the Constitution.

The Court has repeatedly recognized family rights, describing them as an "essential right," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), the "basic civil right of man," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), "[r]ights far more precious than property rights," *May*

v. *Anderson*, 345 U.S. 528, 533 (1953), or "fundamental rights," *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring). In short, it is beyond question that the preservation of the family unit is a liberty interest which enjoys protected status under the Due Process Clause of the Fourteenth Amendment. *Quilloin* v. *Walcott*, 434 U.S. 246 (1978); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (hereinafter cited as *Smith* v. *OFFER*); *Roe* v. *Wade*, 410 U.S. 113 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).[2]

More specifically, in the context of this case, the Court has held that parents are entitled to a hearing on their fitness as parents before the state may take custody of their children. *Stanley* v. *Illinois*, *supra*. Having thus recognized that the parents' liberty interest in the "companionship, care, custody and management of [their] children" merits due process protection, the inquiry now turns to the essential components of that protection. *Stanley* v. *Illinois*, *supra*, 405 U.S. at 651.

II. THE FOURTEENTH AMENDMENT DUE PROCESS GUARANTEE ENTITLES PARENTS TO COUNSEL IN PROCEEDINGS TO TERMINATE THE PARENT-CHILD RELATIONSHIP.

This Court has frequently reiterated that due process is flexible and "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). *See, also, Goldberg* v. *Kelly*,

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[2] Other Constitutional protections have been extended to the family unit. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978) (Equal Protection under the Fourteenth Amendment); *Griswold* v. *Connecticut*, *supra*, 381 U.S. at 496 (privacy right under the Ninth Amendment).

397 U.S. 254, 263 (1970); *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). In *Matthews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the Court identified three factors that must be considered in determining whether a prescribed procedure meets the requirements of due process: First, the private interest that will be affected by the official action; second, the risk of an erroneous decision under the challenged procedure and the probable value of additional procedural safeguards; and third, the countervailing interest in support of the challenged procedure. This test has been utilized by the Court in the specific context of state-family conflicts. *Parham* v. *J.R.*, 442 U.S. 584 (1979); *Smith* v. *OFFER*, *supra*, 431 U.S. at 847-48.

A. Private Interest.

This Court has long emphasized the substantial interest in preserving family integrity. *See* Part I, *supra*. In its consideration of other due process questions the Court has differentiated "family interest" rights from "government bestowed" rights. The Court, for example, has upheld filing fees for indigents in cases concerning welfare appeals [*Ortwein* v. *Schwab*, 410 U.S. 656 (1973)] and bankruptcy petitions [*United States* v. *Kras*, 409 U.S. 434 (1973)]. However, filing fees in divorce actions have been struck down as a denial of due process. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). In distinguishing these holdings, the Court has stated that the interest in welfare and bankruptcy entitlements has "far less constitutional significance" than the interest in marital dissolution at issue in the *Boddie* case. *Ortwein* v. *Schwab*, *supra*, 410 U.S. at 659. *Accord*, *Stanley* v. *Illinois*, *supra*, 405 U.S. at 651 (parents' interest in the upbringing of their children "comes to this Court with a respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements").

A termination of parental rights is the ultimate legal infringement upon the family. There are few, if any, state imposed deprivations more unyielding and personal than the permanent and irrevocable loss of one's children. As a federal court has observed: "[T]he loss of one's child may be the severest form of punitive sanction." *Brown* v. *Guy*, 476 F. Supp. 771, 773 (D. Nev. 1979).[3] Deprivations of this magnitude have prompted the Court, under Due Process analyses, to confer counsel rights on indigent criminal defendants [*Gideon* v. *Wainwright*, 372 U.S. 335 (1963)], as well as juveniles charged with delinquent behavior [*In re Gault*, 387 U.S. 1 (1967)].

Unlike other custody proceedings, termination orders are irrevocable and nonmodifiable. The cessation of parental rights and duties is total: parents lose any right to visit or communicate with the child; they may no longer participate in fundamental decisions which influence their children's rearing, such as schooling, medical treatment, and religious affiliation; or more intimate, daily decisions like diet, curfews, and vacation plans. Even the right to receive notice of legal proceedings affecting their child is lost. *E.g.*, N.C. Gen. Stat. § 7A-289.33 (Cum. Supp. 1979). In short, the severance is absolute and permanent; it is as if the parent-child relationship never existed.

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[3] The equation of termination of parental rights with penal sanctions is a reoccurring theme throughout state court decisions which have vested parents with a right to counsel. *See, In re Howard*, 382 So. 2d 194, 198 (La. Ct. App. 1980); *Danforth* v. *State Dep't of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973); *In re Adoption of R.I.*, 455 Pa. 29, 30, 312 A.2d 601, 602 (1973); *State ex rel. Lemaster* v. *Oakley*, 203 S.E. 2d 140, 144 (W. Va. 1974). Congress has also, in its considerations of the Indian Child Welfare Act of 1978 [25 U.S.C. § 1901] concluded that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty. . . ." H. Rep. No. 95-1386, 95th Cong., 2d Sess. 22 (1978).

B. Risk of Error/Additional Safeguard.

Given the high value placed on family integrity and the severe consequences of its breakdown, stringent procedural safeguards are essential to minimize the risk of erroneous deprivation of parental rights. Under the North Carolina procedure now at issue, the petitioner, an indigent mother, was denied the right to counsel at public expense. It is this denial which makes the procedures constitutionally infirm.

The possibility of error in a termination of parental rights dispute runs high. Unlike the decisions at stake in *Mathews* v. *Eldridge, supra,* 442 U.S. at 343, those involved here are neither "sharply focused" nor "easily documented." Consequently, judges "may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." *Smith* v. *OFFER, supra,* 431 U.S. at 835 n. 36. As Mr. Justice Stevens noted:

> "That standard [best interest of child] provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores. . . ." [*Bellotti* v. *Baird,* 443 U.S. 622, 655 (1979) (concurring opinion).]

Due to this lack of guidance and broad-based standards, the same factual situation frequently supports contrary judicial interpretations, a fact confirmed by a recent study. In this study, three experienced juvenile court judges were handed fifty case files on real families and asked if the parents' rights to their children should be terminated. The judges concurred in less than one-half of the cases. Moreover, even when they agreed, "the judges did not identify the same factors, as determinants, each seeming to rate to some extent within his own

unique value system." Mnookin, *Foster Care—In Whose Best Interest?* 43 Harv. Educ. Rev. 599, 620 (1973).[4]

A recent national survey of our foster care system supports this finding. After conducting regional hearings and listening to more than 400 witnesses, the National Commission on Children in Need of Parents concluded:

> "[T]he confused, arbitrary and subjective handling of parental rights cases by the courts [is] a major reason why children spend their critical years adrift in foster care. . . ." [*Who Knows? Who Cares? Forgotten Children in Foster Care* 10 (1979).]

In light of the high stakes involved, these cases call for counsel to assist parents.[5] Skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for appeal. In the context of termination proceedings, *pro se* litigants cannot adequately perform any of these tasks. Indeed, parents against whom the state moves to terminate parental rights are perhaps even less able to represent themselves than most lay citizens. A recent study found that such parents have, on the average, minimal educa-

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[4] According to one commentator, termination decisions rest primarily on the judge's "personal assessment—an assessment which may be subject to his personal biases and idiosyncracies." Consequently, "different judges in the same state are likely to respond differently to the same set of facts." DeFrancis, V., *Termination of Parental Rights—Balancing the Equities* (1971).

[5] Although an indigent parent should be entitled to both notice and appointment of counsel by the court, the parent may waive this right. However, such waiver must be deliberately and knowingly made. *Faretta* v. *California*, 422 U.S. 806, 835 (1975). *Cf.*, Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901, 1912(b) (Indian custodian or parent in a termination proceeding "shall have the right" to court appointed counsel).

tion backgrounds. Schetky, Morrison, & Sack, *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. Am. Acad. Child Psych. 366 (1979).[6]

The statutory basis for the original termination order in this case demonstrates the need for legal counsel. The following is, in part, the statutory ground for termination that was applied:

> "The parent has *willfully* left the child in foster care . . . without showing to the satisfaction of the court that *substantial progress has been made* . . . in correcting those conditions which led to the removal of the child for neglect or without showing *positive response* . . . to the *diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship* to the child or to make and follow through with *constructive planning* for the child." [N.C. Gen. Stat. § 7A-289.32(3) (Cum. Supp. 1979) (emphasis added).][7]

This complex statute necessitates the participation of counsel to identify and frame legal and factual issues. The italicized language suggests several areas upon which trained counsel might focus, either to hold the state to

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[6] *See, also,* A. Gruber, *Children in Foster Care, Destitute, Neglected . . . Betrayed* 137 (1979). In fact, a frequent ground for state intervention into the family is the parent's mental incapacity. Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1021 (1975). For a discussion of the need for legal representation for parents in these cases, *see,* Besharov, *Parents in Child Protective Proceedings: The Emergent Right to Counsel*, in ADVOCATING FOR CHILDREN IN THE COURTS 22 (1979); Catz and Kuelbs, *The Requirement of Appointed Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area*, 12 J. Fam. L. 223 (1973-74).

[7] Juvenile Petition at 1-2. *See* Appendices to Reply to Respondent's Brief in Opposition, Appendix I at 2.

its burden of proof or to mount an affirmative defense. For example, the attorney might assert a lack of "diligent efforts" by the public agency to encourage the "parent to strengthen the parental relationship." In fact, many lower court termination orders have been reversed as a result of the agency's failure to assist the family;[8] the *pro se* litigant is not likely to know that supportive services by the state are legally mandated. Parents, untutored in the law, can, at best, deny the allegations of the state; seldom does their limited legal sophistication lead to the reframing of issues before the court.

Pro se litigants cannot adequately conduct investigations and pre-trial discovery. The initial step in the investigation of a termination case by parents' counsel typically involves obtaining a copy of the agency case file. This file contains critical information: an account of the agency's activities, the identity of potential expert and lay witnesses, and reports or summaries of reports from police, mental health personnel, physicians and other professionals. Without the assistance of counsel a parent might not even secure a copy of this file;[9] the parent may be ignorant of proper discovery avenues such

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[8] *See, e.g., Arizona State Dep't of Economic Security* v. *Mahoney*, 24 Ariz. App. 534, 540 P.2d 153 (1975); *In re Taylor*, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1975); *In re Kimberlin I.*, 421 N.Y.S.2d 649 (1979); *In re Christopher H.*, 577 P.2d 1292 (Okla. 1978); *Weaver* v. *Roanoke Dep't of Human Resources*, 265 S.E. 2d 692 (Va. 1980). In North Carolina, the Governor's Advocacy Council on Children and Youth reported that 50% of the natural parents surveyed claimed they never received services after their children were placed in foster care. *Why Can't I Have a Home? A Report on Foster Care and Adoption in North Carolina* 48-49 (1978). This lack of services to families is a common characteristic throughout the country. Children's Defense Fund, *Children Without Homes* 15-21 (1979).

[9] Some state statutes and regulations specifically authorize release of agency case reports only to attorneys. *See, e.g.*, Or. Rev. Stat. § 419.657(2) (1979).

as making a request for the production of evidence, scheduling a deposition, or serving a subpoena *duces tecum*. Even at trial the parent may never view the file, or will be unable to use it as a weapon, *e.g.*, as the basis of impeaching a witness.

The disadvantages to *pro se* litigants becomes more visible at trial. Already weakened by incomplete investigation and ignorant of trial procedures, parents are unable to introduce factual contentions in support of their fitness in an orderly and legally persuasive manner. Aggravating this inability are the very complex issues which arise in termination actions. These actions involve the diagnosis of the parent-child relationship, a current analysis of the mental and emotional capacity of the parent to care for the child, and a prognosis of future parental abilities. Unlike most criminal or personal injury actions, which look to the guilt or innocence, or liability or non-liability of the defendant arising from a single incident, termination actions examine conduct over the long term and then attempt to predict future behavior. Accordingly, parents must often secure and present expert testimony from physicians, psychiatrists, psychologists and clinical social workers. Their very ability to obtain these experts is suspect; they may be unaware of diagnostic evaluation services, often secured by court order [*e.g.*, N.C. Gen. Stat. § 7A-289.30(b) (Cum. Supp. 1979)], or that they can subpoena experts who have personal knowledge of the case.

Assuming expert witnesses are identified and secured, the parent, unschooled in the art of direct examination, faces insurmountable obstacles. Some of the trouble spots include: qualifying the expert, framing hypothetical questions, avoiding leading questions, and eliciting permissible expert opinion. Examining lay witnesses may also pose problems. Without a firm grasp of the legal issues,

the questioning may only produce irrelevant ramblings.[10] Similarly, the lay litigant will rarely make persuasive opening and closing statements. The instant case illustrates this point; the petitioner's closing argument was as follows: "I don't think it's right." Trial tr. 61.

Unrepresented parents cannot conduct effective cross-examination. When confronting expert witnesses of the state, they will passively accept the alleged expert's credentials, overlook potential biases and generally fail to discredit the expert opinion. Indeed, such failures are preordained as lay litigants do not comprehend the rudiments of cross-examination, let alone its art. Again, the instant case highlights the futility of a parent's cross-examination:

> THE COURT: All right. Do you want to ask her any questions?
> MS. LASSITER: About what? About what she . . .
> THE COURT: About this child.
> MS. LASSITER: Oh, yes.
> THE COURT: All right. Go ahead.
>
> CROSS EXAMINATION by MS. LASSITER:
>
> The only thing I know is that when you say . . .
> THE COURT: I don't want you to testify.
> MS. LASSITER: Okay.
> THE COURT: I want to know whether you want to cross-examine her or ask any questions.

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[10] The trial transcript in the instant case amply depicts this problem. The petitioner was unable to examine her sole witness (her mother); the trial judge had to undertake the questioning. Without benefit of prior interviews and case preparation, even the judge could not conduct a cogent direct examination. Ultimately, in frustration, he forsook further questioning, admitting that it was "just wasting time" because the witness was "skipping from one subject to another." Trial transcript 52 (hereinafter cited as Trial tr.). The trial transcript has been lodged with the Clerk of this Court.

MS. LASSITER: Yes, I want to. Well, you know the only thing I know about is my part that I know about it. I know . . .

THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.

MS. LASSITER: About that?

THE COURT: Yes. Do you understand the nature of this proceeding?

MS. LASSITER: Yes, I know.

THE COURT: Are there any questions you want to ask her about what she has testified to?

MS. LASSITER: Yes.

THE COURT: All right. Go ahead.

Q: I want to know why you think that you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.

THE COURT: Who is he?

Q: My son, William.

A: Ms. Lassiter, your son has been in foster care since May of 1975 and since that time . . .

Q: Yeah, yeah and I didn't know anything about it either.

[Trial tr. 19-20.]

Without meaningful cross-examination, the risk of error in these cases substantially increases. Judges will rely more heavily upon the state's unchallenged presentation. Such reliance is ill-advised; study after study has revealed that child welfare workers carry too many cases, have little training, and maintain minimal contacts with their client-families. National Commission on Children in Need of Parents, *supra*, at 15; Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. Pitt. L. Rev. 1, 14-15 (1973).

Unaided by counsel, parents likewise cannot raise objections and exclude improper evidence submitted by the state. Unopposed by a trained adversary, the attorney for the state may employ incompetent evidence and bend

ordinary trial procedures. Here, respondent's case was predominantly based upon the following evidence: findings from an earlier court proceeding at which petitioner was not present and for which only hearsay was relied upon to show that she had received notice [Trial tr. 17, 30, 31, 32, 33, 42]; the agency case record which, although hearsay, was never described, offered into evidence or made an exhibit to the proceedings [Trial tr. 11, 12, 13, 18, 19]; and other hearsay testimony by the state's sole witness, the social services worker [Trial tr. 14, 15].

The trial transcript of this case, as a whole, is an eloquent example of the inability of uneducated litigants to function in the court system without legal representation. Further testimony to the critical role of counsel in these cases may be found in a case study which contrasted the dispositions between parents with and without counsel in temporary custody and termination proceedings.[11] A New Jersey Court, in examining the results of this study, stated that "the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of absence of counsel. . . ." *Crist* v. *Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203, 208 (1974), *quoting* Note, *Child Neglect: Due Process for the Parent*, 70 Colum. L. Rev. 465, 467 (1970).

C. Countervailing Interests.

In cases where additional due process rights have been sought, a frequent countervailing interest articulated by the government is the financial cost to the public. The state's fiscal interest may take precedence only if counsel is not essential to a fair hearing, or if the parent's interest in a fair hearing is *de minimis*. Otherwise, the Court

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[11] Note, *Representation in Child Neglect Cases: Are Parents Neglected?* 4 Colum. J.L. & Soc. Prob. 230, 241 (1968).

has rejected economic arguments as adequate justification for withholding procedures necessary to protect fundamental rights of citizens. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 265-66; *Watson* v. *City of Memphis*, 373 U.S. 526, 537 (1963). *Cf.*, *Cleavor* v. *Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974) (society's and parent's interest in maintaining family integrity outweighs state's interest in saving money).

This Court's own assessment of the need for counsel addresses the first concern; parents "hailed into court" and pitted against the vast resources and legal means of the state "cannot be assured a fair trial unless counsel is provided for [the parent]." *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 344. *See* Part II B, *supra*. Adhering to this rationale, one United States District Court recently opined:

> "When the State intrudes with its vast resources in an attempt to disassemble [the parent-child relationship], then every safeguard under the law must be abundantly exercised by the Court to guarantee that the inherent imbalance of experience and expertise between the parent and state is minimized . . . . [O]ne of the essentials would be to put the parent in a near equal position as far as counsel is concerned with the State." [*Brown* v. *Guy*, 476 F. Supp. 771, 773 (D. Nev. 1979).]

Furthermore, the Court's consistent holdings instruct that a parent's liberty interest in the preservation of family integrity is far from *de minimis*. See Part I, *supra*.[12]

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[12] In any event, the state should move with extreme caution before terminating parental rights; its own ability to act as a surrogate parent has been widely assailed. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Abuse and Neglect Cases*, 63 Geo. L. Rev. 887, 899 (1975); Wald, *State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 994 (1975). Even though the state's underlying motive in moving for termina-

This combination of important parental rights and fair hearing requirements has prompted a majority of states, by legislative [13] or court [14] decree, to provide counsel for indigent parents in these proceedings. In addition, Congress has granted this right to Indian parents in child welfare-related proceedings.[15]

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tion of parental rights is to free the child for adoption, termination may occur in most states before there are potential adoptive parents. And studies have confirmed that the longer the child remains in foster care, the less likely are his chances of being adopted. D. Fanshel and E. Shinn, *Children in Foster Care: A Longitudinal Investigation* 120-121 (1978); H. Maas and R. Engler, *Children in Need of Parents* 421 (1959).

[13] *See, e.g.*, Ariz. Rev. Stat. Ann. § 8-225 (Supp. 1980); Cal. Civ. Code Ann. § 237.5 (West Supp. 1980); Kan. Stat. Ann. § 38.820 (Supp. 1979); N.Y. Soc. Ser. Law § 384-a (McKinney Supp. 1979). For a complete statutory listing *see* Petitioner's Brief on the Merits.

[14] These decisions, granting counsel rights to indigent parents in termination proceedings, all rest upon due process considerations. *Dep't of Public Welfare* v. *J.K.B.*, 393 N.E.2d 406 (Mass. 1979); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *Crist* v. *Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203 (1974); *In the Matter of B.*, 30 N.Y.2d 352, 334 N.Y.S.2d 133, 285 N.E.2d 288 (1972); *Matter of Chad S.*, 580 P.2d 983 (Okla. 1978); *State* v. *Jamison*, 251 Or. 114, 444 P.2d 15 (1968); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Welfare of Myricks*, 85 Wash. 2d 252, 533 P.2d 841 (1975); *State ex rel. Lemaster* v. *Oakley*, 203 S.E.2d 140 (W. Va. 1974). In recent years, the right to counsel has also been extended to indigent parents on appeal of termination orders. *See, e.g., In Interest of Brehm*, 3 Kan. App. 2d 325, 594 P.2d 269 (1979); *In re Welfare of Luscier*, 84 Wash. 2d 135, 524 P.2d 906 (1974). More recently, the South Carolina Supreme Court has recognized a constitutional right to transcripts on appeal of these orders. *South Carolina Dep't of Social Services* v. *Wilson*, 49 U.S.L.W. 2291 (Nov. 4, 1980).

[15] Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(b) (Supp. 1980).

In the remaining jurisdictions, the public cost of providing counsel should be small. According to the National Center for State Courts, only four states—North Dakota, Rhode Island, Alaska, and Iowa—compile data on termination caseloads. For calendar year 1977, North Dakota reported 177 termination cases filed, as compared with 17,691 misdemeanor and felony cases.[16] For that same year, Rhode Island reported 133 termination petitions but nearly 30,000 criminal arraignments.[17] In 1978, Alaska reported 14 termination of parental rights dispositions in the superior courts as opposed to 905 felony and 240 "other criminal case" dispositions,[18] while the Iowa Judiciary indicated 947 termination petitions filed in comparison to 27,942 "regular criminal cases."[19] In these states, the termination of parental rights caseload ranges from about four-hundredths of a percent to a little over three and a third percent of the criminal docket.

Under *Gideon* and its progeny, the state must already provide counsel to indigent criminal defendants. The above comparative statistics suggest that the additional cost of providing counsel to parents in termination proceedings would be relatively minor.

III. THE RIGHT OF PARENTS TO COUNSEL HAS BEEN INCORPORATED INTO STANDARDS OF THE AMERICAN BAR ASSOCIATION AND OTHER ORGANIZATIONS.

In February 1979, the House of Delegates of the American Bar Association adopted a set of Juvenile Jus-

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[16] *State of North Dakota—North Dakota Judicial Council Annual Report Calendar Year 1977*, at 24, 29, 31.

[17] *1977 Report on the Judiciary State of Rhode Island*, at 31, 33.

[18] *Alaska Court System: 1978 Annual Report*, at C-61, C-13, C-28.

[19] *1978 Annual Statistical Report, Iowa Judiciary*, at 67, 76.

tice Standards developed by a joint commission of the Association and the Institute of Judicial Administration. One of these volumes, entitled *Standards Relating to Counsel for Private Parties*, states, as its first principle:

> "The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings." *Id.* at § 1.1.

A later section in this volume specifies that: "Counsel should be available to the respondent parents . . . in a neglect or dependency proceeding. . . . Counsel should be available at all stages of such proceedings and in all proceedings collateral to neglect and dependency matters . . . ." *Id.* at § 2.3(b). The Commentary makes clear that a termination case may be collateral to a neglect or dependency proceeding, especially in cases similar to the one now before the Court, where the termination petition arises from an earlier neglect holding. N.C. Gen. Stat. § 7A-289.32(3) (Cum. Supp. 1979).

The underlying rationale for this Standard is explained in the Commentary. Loss of custody of one's child is viewed as a more severe consequence than penalties associated with most civil actions. As a result, the greater procedural protections afforded criminal defendants, *e.g.*, counsel, are more appropriate in actions which affect the right to custody. Furthermore, since the state is the adversary, "there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel." *Id.* at 72.

The Model Adoption Legislation and Procedures Advisory Panel has reached a similar recommendation.[20]

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[20] The Model Adoption Legislation and Procedures Advisory Panel was established pursuant to the Child Abuse Prevention and Treatment and Adoption Reform Act, 42 U.S.C. §§ 5101, 5112 (1978), as an independent expert panel to recommend to the Secre-

Under the proposed *Model State Adoption Act and Model State Adoption Procedures*, indigent parents subject to involuntary termination of parental rights proceedings must be notified of their right to counsel and, if they so request, appointed counsel. *Id.* §§ 311, 317. Numerous other model acts and standards echo this principle. *See e.g.*, National Conference of Commissioners on Uniform State Laws, *Uniform Juvenile Court Act* § 26 (1968); National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention* Standard 16.6 (1976); National Council of Juvenile Court Judges, Neglected Children Committee, *Model Statute for Termination of Parental Rights* § 6 (1976); Katz, *Freeing Children for Permanent Placement Through a Model Act* § 12(a) (1978).

The above Standards and Model Acts are, of course, not binding upon this Court. They represent, however, the considered judgment of many knowledgeable and disinterested persons concerned with a serious problem throughout the nation. As such, their recommendations are, we submit, entitled to substantial weight.

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tary of the United States Department of Health, Education and Welfare model legislation and procedures relating to adoption, with special attention to barriers to the adoption of special needs children. The Panel is composed of a state legislator, state child welfare administrator, a juvenile court judge, a birth parent, adoptive parent, and others with expertise in child welfare. The model law as submitted by the Panel to the Secretary has been published for public comment, 45 Fed. Reg. 10622 (1980).

CONCLUSION

In view of the foregoing, the American Bar Association urges this Court to hold that indigent parents, in proceedings to terminate their parental rights, are entitled under the Fourteenth Amendment Due Process Clause to counsel at public expense.

Respectfully submitted,

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

Petitioner,

v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF NATIONAL CENTER ON WOMEN AND FAMILY LAW, INC., COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND BEDFORD-STUYVESANT COMMUNITY LEGAL SERVICES CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Community Action for Legal Services, Inc., National Center on Women and Family Law, Inc., and Bedford-Stuyvesant Community Legal Services Corporation, respectfully move, pursuant to Rule 36 of this Court's Rules, for permission to file the within brief Amici Curiae in Lassiter v. Department of Social Services of Durham County, North Carolina, by reason of the Amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the issues presented herein.

The attorneys for all parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Appellant and Appellees have granted their consent.*

*Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Community Action for Legal Services, Inc. is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all the trial courts in New York City, in the State and Federal Appellate Courts and in this Court. Bedford-Stuyvesant Community Legal Services Corporation is one of CALS' delegate corporations. Its neighborhood office is located in

Brooklyn, New York. It has one of the most active family law practices of any of the neighborhood offices.

Approximately 20% of the cases handled by CALS neighborhood legal services offices, including Bedford Stuyvesant Community Legal Services Corporation, are in the area of family law. These cases include a significant number involving the termination of parental rights in the Family Court of the State of New York -- at least 1,000 cases since 1967.

Attorneys associated with CALS as well as Bedford-Stuyvesant Legal Services have handled many reported cases involving termination proceedings and related areas of family law, including Smith v. Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents); Shelton v. Smith 422 F. Supp. 460 (E.D.N.Y. 1976) aff'd,

547 F. 2d 768 (2d Cir. 1976) (termination of visitation between parents and children in foster care without due process); Matter of Ray A.M. 37 N.Y. 2d 622 (termination of parental rights); and Matter of Orlando F. 40 N.Y. 2d 103 (1976) (termination of parental rights).

National Center on Women and Family Law, Inc. is a private not-for-profit organization incorporated under the laws of the State of New York for the purpose of litigating on behalf of poor women in the area of family law and to provide technical assistance on women's issues and issues in family law to Legal Services attorneys in every state.

The constitutional question raised by the instant appeal, namely whether due process requires that an indigent parent, in a proceeding to involuntarily terminate her parental rights with regard to her child, must be

assigned counsel, is one of central concern to Community Action for Legal Services, Inc., National Center on Women and Family Law, Inc., and the Bedford-Stuyvesant Community Legal Services Corporation.

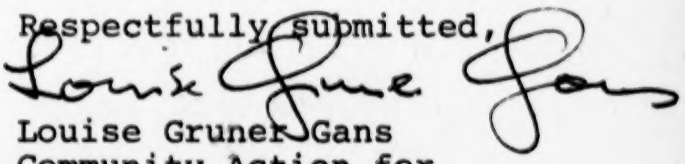
The Amici have considerable experience with the kinds of constitutional issues which are presented here, and with the way these issues affect indigent parents. They are well acquainteded with policies and practices of state foster care agencies which often lead to unnecessary termination of parental rights. They know well the complexity of parental termination hearings, the patterns of procedural irregularity which occur in so many of these cases, and the economic, racial and sexual biases inherent in the process.

Accordingly, Amici wish to submit their brief because of their concern about the impact of this case on

their clients and because they hope to be able to present to the court an analysis of the issues from the standpoint of the indigent parent which may not otherwise be presented.

Wherefore, Community Action for Legal Services, Inc., National Center on Women and Family Law, Inc., and Bedford-Stuyvesant Community Legal Services Corporation respectfully request leave to file the attached brief as Amici curiae.

Respectfully submitted,



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IN THE
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OCTOBER TERM 1980

NO. 79-6423

ABBY GAIL LASSITER,

Appellant,

-against-

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Appellees.

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CAROLINA

BRIEF AMICI CURIAE OF
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INTEREST OF AMICI CURIAE

The interest of the Amici curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case is before this court a result of the issuance of a writ of certiorari to review the decision of the North Carolina Court of Appeals, filed November 6, 1979, affirming the judgment of the District Court of North Carolina for Durham County, which on September 7, 1978 permanently terminated the parental rights of the Appellant, Abby Gail Lassiter, to her child. Appellant is a young indigent black woman, whose son William was born on September 24, 1974. In April 1978, the Durham County Department of Social Services filed a petition for termination of Appellant's parental rights to William. Appellant received notice of the proceeding in

prison. On August 31, 1978 a hearing was held on the termination petition, Appellant and her mother both appeared at the hearing but Appellant was not represented by counsel. When questioned by the court about when she received notice of the hearing, Appellant showed considerable confusion about the dates of various notices. When the court asked her whether she had sought legal help with the case, she said simply that she had told the matron at the prison about it but that the matron had done nothing to help. Although the court referred Appellant to a Legal Services office at the close of the hearing for help with her appeal, no such referral was made before the hearing. The court permitted Appellant to proceed with the hearing without counsel. On the basis of this hearing, the court issued its decision terminating Appellant's parental rights.

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a state to furnish an indigent parent court-appointed counsel in a proceeding to terminate permanently and irrevocably her parental rights.

SUMMARY OF ARGUMENT

A proceeding for termination of parental rights results in the ultimate deprivation of a fundamental civil right: the right of a parent to the "care, custody, management and companionship of her minor children" May v. Anderson, 345 U.S. 528, 533 (1953). Termination of parental rights has been likened to the death penalty.

Because of the severity of the deprivation and the complexity of the issues involved, and because of the special dynamics of the foster care system, the meaningful defense of a parent in foster care is particularly difficult.

An indigent mother appearing in court alone has no capacity to understand or deal with her situation. In the absence of counsel, the risk of an erroneous termination is extremely high.

The provision of counsel could significantly decrease the risk of error, as counsel would develop and present defenses which the parent would be unable to recognize, insure that the state's burden of proof is met and supported by reliable evidence, and protect the parent against bias and impropriety.

Making the termination proceeding more fair and reliable would further the interests of the state. The state's interest in fair adjudication is consis-

tent with its interest in preserving families and protecting children. Erroneous termination of parental rights disserves those interests as the state may not promote adoption for its own sake at the expense of protected familial rights. The cost of providing assigned counsel is not a sufficiently significant detriment.

Due process requires the provision of assigned counsel for indigent parents in termination cases. Without counsel, such parents are deprived of a meaningful opportunity to be heard. Termination proceedings are closely analogous to criminal cases in purpose, structure, and possible outcome. The nature and consequences of the proceeding and the goal of equal justice require that assigned counsel be provided in all cases.

DUE PROCESS REQUIRES COURT APPOINTMENT OF COUNSEL FOR INDIGENT PARENTS IN PROCEEDINGS FOR TERMINATION OF PARENTAL RIGHTS

A. Introduction

For many parents and families termination of parental rights is the bitter and fatal end of the foster care placement of their children. Amici have found that like the Appellant, Abby Gail Lassiter, most parents find the very concept of termination of parental rights unthinkable and incomprehensible.[1] The utilitarian concept of the "disposable" family developed by the "helping" professions, whereby deprived, incapacitated or deviant family members can be discarded and replaced by ones having more utility, is alien to ordinary Americans.

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1. .....he knows us and he knows my mother. And I feel why you should adopt him, he have a family, we are his family. Why you want to place him in adoption among strange people that not his family and they got no relationship to him and his family is over here, my mother and I." (Trial T p.22-23).

While Amici believe that in the case of a truly homeless and unwanted child termination of parental rights may be a necessary means to provide the child with a permanent home, this draconian measure has not proven to be a panacea for foster children and has often been profoundly unjust in its application.

In Smith v. Organization of Foster Families, 431 U.S. 816, 828-31 (1977), this court had an opportunity to scrutinize some aspects of the foster care system. But the focus of the class of parents in Smith was on the rights of parents, foster parents and children in circumstances where social services officials or public agencies were proposing the removal of the children from foster care for the purpose of returning them home. When social services officials initiate proceedings to terminate parental rights, however, parents and extended family members find those officials and frequently also the foster parents

squarely arrayed against them.

An understanding of the foster care context in which proceedings for termination of parental rights are brought will assist the court in making its assessment of

> first the private interest that will be affected by the official action, second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Matthews v. Eldridge, 424 U.S. 319, 335 (1976)

Amici believe that informed balancing of these factors makes the conclusion that indigent parents have the right to court appointment of counsel in termination proceedings inescapable.

B. The Private Interest At Stake.

The right of a parent to rear his or her own minor children has consistently been recognized by this Court as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. Quilloin v. Walcott, 434 U.S. 246 (1978). A mother's right to the "care, custody, management, and companionship of her minor children [is a right] far more precious than property rights." May v. Anderson, 345 U.S. 528, 533 (1953). "The primary role of parents in the up-bringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 405 U.S. 205, 232, (1972).

A mother's right to the "care, custody, management, and companionship of her minor children [is a right] far more precious [...]than property rights." May v. Anderson, 345 U.S. 528, 533 (1953).

Parental rights are part of a spectrum of rights to privacy and automony in family life in the spheres of "marriage, procreation, contraception --family relationship, and child rearing and education," Roe v. Wade, 410 U.S. 113, 152 (1973)(citations omitted); that has been held to encompass extended family relationships, Moore v. City of East Cleveland, 431 U.S. 494 (1977).

> "The entire fabric of the Constitution and the purposes that clearly underly its specific guarantees demonstrate that the rights of marital privacy and to marry and raise a family are of a similar order and magnitude as fundamental rights specifically protected," Griswold v.Connecticut, 381 U.S. 479,495 (1965).

The result of a proceeding to terminate parental rights is the total

deprivation of the right to family integrity. In Stanley v. Illinios, 405 U.S. 645 (1972), this court recognized the magnitude of the constitutional deprivation threatened in such a proceeding. Termination of parental rights is final and irreversible. It "means that the child is dead so far as the parent is concerned". In re William L., 383 A. 2d 1228 (Manderino, J., dissenting), cert. den., 439 U.S. 880 (1978). The identification of termination of parental rights with death is a valid one. Indeed, the termination has been called the "death penalty" for parents of dependent or neglected children.[2]

2. Catz & Kuelbs, The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings: A Developing Area, 13 J. Fam. L. 223, 233 (1974).

C. The Risk of Erroneous Deprivation

In view of the fundamental importance of the rights involved and of the extremity of the deprivation threatened in termination proceedings, the greatest care should be exercised to prevent the erroneous deprivation of those rights. Unfortunately, the state officials who instigate and adjudicate such proceedings do not typically exercise such care.

Certain recurring and disturbing practices are connected with termination of parental rights proceedings. First, social services officials with their broad discretionary power over the lives of parents and their children in foster care actually "entrap" parents into becoming subject to termination of parental rights. Second, the factors of race, sex and class bias become issues in termination cases regardless of the applicable statutory standards.

Third, social services officials initiate termination of parental rights proceedings without any assurance of the existence of or subsequent effort to find a permanent adoptive home for the child. Fourth, termination of parental rights proceedings are characterized by widespread procedural irregularities. Each of these practices has a significant and improper impact on the result in termination proceedings, as this case clearly illustrates.

1. Contrived Terminations.

Many parents of children in foster care are placed in a position where a case for termination of parental rights can be established against them as a result of acts or omissions of social services officials over which the parents have no control.[3] Frequently, this is

3. The filing of criminal charges of incest between the parents in Doe v. Delaware, No. 79-5932 October Term, 1979 in order to secure custody of their younger children as a prelude to termination proceedings as to all "because we can't prove the [parents] unfitness if there are children in the home")Parents Trial Exhibit 21) provides a particularly blatant example.

accomplished through outright denial of or failure to facilitate parental visitation.[4] In most cases, abandonment or failure to visit with one's child for some specified length of time is a ground for permanent termination of parental rights. Because agency officials control visitation, they have the power to create the grounds for subsequent termination of parental rights by denying or severely restricting the ability of parents and relatives to visit.

It is the experience of Amici that foster care agencies place a low priority on parental visitation. The New York experience is typical of "policies and

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4. Another way in which parents are "entrapped" is the effectively total failure by agencies to provide needed services to correct family problems which led to the initial foster placement. In North Carolina and in other states, there is a statutory prerequisite to termination of parental rights of the agency's "diligent efforts... to stregthen the parental relationship." N.C. Gen. Stat. §7A-289.32(3) This prerequisite was ignored in Lassiter as in many cases in Amici's experience.

and practices that make if difficult if not impossible for parents to visit their children."[5] In New York, a mother is permitted to visit her child for one hour a month or one hour every two weeks at the office of the social services agency. Thus, in the course of one year she will be able to spend a maximum of 12 to 24 hours with her child. In fact, visitation may be discontinued entirely by agency fiat or by court order.[6]

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5. Children's Defense Fund, Children Without Homes (1978) pp.22-24.

6. See Policy Statement Parental Visiting Appendix D, Children's Defense Fund, Children Without Homes, (1978) p.192. Amici can attest from their own experience that the Policy Statement was never implemented and the practices rejected by the Policy Statement continue. In 1980 the New York City Mayor's Task Force on Foster Care recommended that there should be at least one visit between parent and child in foster care a month! Redirecting Foster Care, A Report to the Mayor of the City of New York (1980),37.

See also Doe v. Delaware, No. 79-5932 (October Term, 1979), now pending before this Court, wherein the parents were denied any visitation from the time the children were removed from their parent's home up until the initiation of parental rights termination proceedings several years later.

Appellant clearly was not provided the opportunity to visit with her child. The social worker contacted her only once--after the lengthy separation which formed the original grounds for the termination of her parental rights had occurred--and then, merely to determine if she would waive her right to a hearing before her parental rights were terminated.[10] And the testimony of Mrs. Lucille Lassiter, who visited her grandchild three times in as many years, recites the common experience of a relative's frustrated efforts to find and communicate with the "proper" caseworker concerning promised visitation.[11]

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10. See Trial Tr. 15.

11. See Trial Tr. 8, 51-52.

To visit a foster child, the parent or relative is expected to provide his or her own transportation expenses, often to distant and unfamiliar places,[7] to initiate and confirm appointments with a particular social worker whose indentity frequently changes and who is often absent from the office, to perservere despite visits cancelled without notice and despite scheduling which exclusively accomodates the convenience of social worker and foster parent.

Visitation for a parent who is hospitalized or incarcerated is even more problematic. At many prison facilities, visits by children are prohibited altogether, visiting hours are restricted, and of course the children must be brought by a willing adult. One study reports that many foster care workers opposed bringing

7. Children's Defense Fund, Children Without Homes (1978), 22-23.

children to prison, that incarcerated mothers often experience difficulty in finding out where their children in foster care are and that child welfare workers seldom make any real effort to maintain contact with incarcerated mothers.[8]

The case presently before this Court presents a sampler of ways in which State failure to provide or facilitate visitation can defeat parental rights. Most striking is the agency's reliance for making its case for termination on the failure of Appellant to have contact with her child, knowing full well that Appellant was incarcerated for the greater part of the time period at issue, without their showing that visitation was available under these circumstances.[9]

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8. See McGowan & Blumenthal, Why Punish the Children, a Study of Children ~~of Women~~ Prisoners (1978) pp.12-29.

9. See Juvenile Petition, paragraphs 6&7. See also Trial Tr. 27.

2. Disparate Treatment of Poor, Minority and Single Parent Families.

As this Court has recognized, "the poor and victims of discrimination" resort to foster care placement for their children in disproportionately large numbers. Smith v. O.F.F.E.R., 481 U.S. 816, 833-34 (1977). In New York City in 1979, more than 70% of the children in foster care came from families on public assistance,[12] 55% of foster children were born out of wedlock; and over 50% came from female-headed families.[13] Presently, 84% of the children in the city's foster care population come from minority backgrounds. Of these, 56.5% are black, and 23% are Hispanic.[14] The New York foster care experience typifies national trends.[15]

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12. Foundation for Child Development, State of the Child: N.Y.C. II, (1980) 126

13. Redirecting Foster Care, 6

14. State of the Child: N.Y.C. II, 123

15. See Children Without Homes, 49-34

The status of many natural parents as minority welfare recipients is viewed with disfavor by the agencies and courts who determine the fate of their children. The opinions in termination cases frequently refer disparagingly to the parent's receipt of public assistance and single parent status.[16]

Additionally, the tendency of courts to prefer the nuclear family unit to the extended family custodial arrangements "familiar among [e.g.] black families" noted by this Court, Moore v. City of East Cleveland, 431 U.S. 494 (1977) at 504-506) (plurality opinion) and 509 (Brennan, J., Concurring), intrudes insidiously on judicial decision-making in parental termination proceedings. The element of racial bias is palpable even when not expressed in words.

16. In Re Ray A.M., 48 App. Div. 161, 164 (2d Dept.), aff'd, 37 N.Y. 2d 619 (1975).

The generally vague and imprecise standards utilized in termination proceedings make it difficult to prevent the introduction of these extraneous factors.

The transcript of the trial below clearly shows some of these elements of bias in operation. For example, there is the frequent reference to Appellant's receipt of public assistance, although it has no bearing on the cause of action asserted.[17] The record is strewn with provocative remarks to Appellant and Lucille Lassiter, the Appellant's mother, for which there is no apparent justification. When Appellant denied that her mother had filed a complaint against her, she was told "that was some ghost who came up here and filed it, I suppose".[18] When Mrs. Lassiter sought

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17. Trial Tr. 17-18, 30, 57-58.

18. Trial Tr. 30.

to support the truth of her statements with a religious oath, the Court's response is, "I wish you wouldn't talk like that; it scares me to be in the same room with you."[19] Finally, Mrs. Lassiter is admonished not to "intimidate" or "fool with" the social workers.[20] No reason to justify this warning appears in the record.

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19. Trial Tr p.55

20. Trial Tr p.62

3. A Child's Future After Termination Is Still Uncertain.

Termination of parental rights does not assure a child a known and permanent home. This is particularly true of minority children who disproportionately predominate in the foster care population.[21] Moreover, national studies show that Black and other minority foster youngsters like William Lassiter spend a disproportionate share of time in foster care, receive fewer services and benefits than do white children, and are not provided adoption services adequate to their need and number.[22]

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21. Children Without Homes, 49-52 [The Ethnic composition of New York City's foster care population in 1979 was 52% Black and 23% Hispanic. In 1980 the Mayor's Task Force on Foster Care Services reported that during the year ending September 1979 the goal of adoption was reputed in 4,178 youngsters but only 499 were adopted. Id at 69].

22. Redirecting Foster Care (1980) 70.

That there are harms associated with continued foster care placement is also well known. Many children are inappropriately placed, experience social and emotional deterioration and are maltreated in both foster home and institutional placement.[23] At the same time where a parent cannot resume care of a child and adoption is uncertain, agencies and workers may often resist placement of foster children with their relatives.[24]

Indeed, in this case, rather than place Billy Lassiter with his grandmother and sisters, the county attorney asks the court to "free" him for placement with a hypothetical "mother and daddy

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23. State of the Child II 127-128. See also Children Without Homes (1978) 37-48.

24. Children Without Homes, 20-21.

[who would, of course, be] with [Billy] day in and day out."[25] The attorney argued further that Billy should not be with his grandmother because he did not know her.[26] The fact that Billy did not know who--if anyone--would adopt him was ignored.

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25. Trial Tr 60.

26. Id. p.13

4. Procedural Irregularity In Foster Care Adjudication.

In the course of their experience in representing parents in termination proceedings, Amici have encountered with disturbing frequency serious irregularities in proceedings resulting in the initial placement of the children in foster care, in the continuation of placement, in the possible return of children to parents, and in the termination of parental rights. Foster cases, which concern almost exclusively the rights of poor and minority families, seem to invite a greater disregard of the rule of law by state agencies and the courts than do other cases.[27]

Amici have identified these procedural defects common to foster care

27. See tenBroek, California's Dual System of Family Law: Its Origins, Development and Present Status, Pt. I, 16 Stan. L. Rev. 257 (1964) Pt. II, 16 Stan. L. Rev. 900 (1964), Pt. III, 17 Stan. L. Rev. 614 (1965).

adjudication, virtually all present in the Lassiter proceedings. The first is the frequency of unnecessary ex parte seizures of children. Children are removed from their homes abruptly, often on a pretext, with no contemporaneous notice to parent or relative either of the grounds for the seizure or of the possible remedy.[28] In the instant case, William Lassiter was removed from his grandmother's home, not by court order, but by a ruse. Offering to assist the boy's grandmother in taking him for a medical examination at the local hospital, a caseworker from the Durham County Social Services Department took the child with him and never brought him back.[29]

28. Cf. Sims v. Department of Public Welfare 438 F. Supp. 1179, (S.D. Tex 1977, reversed on procedural grounds, sub nom Moore v. Sims, 442 U.S. 415 (1979)

29. Trial Tr. 44-45

The second defect concerns notice. Vague, conclusory, and irrelevant allegations--which give no meaningful notice of the nature of the proceedings or of the actual gravamen of the abuse, neglect, or other unfitness charged against a parent--are normal.[30] Additionally, the timeliness of the notice given is frequently questionable. The Lassiter record raises many questions concerning the sufficiency and timeliness of the notice given Appellant and her mother of the neglect proceeding the state eventually initiated some time after the ex parte seizure of Billy Lassiter.[31] The initial adjudication of neglect, which resulted in Billy's lengthy foster case placement and which was used as evidence against Appellant at the termination proceedings, was entered on default.[32]

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30. Amici have encountered cases where a telephone call was all the legal process a client received in a neglect proceeding.
31. Trial Tr. 27-034
32. Trial Tr. 29.

The third procedural defect common to Amici's experience is the lack of adherence to rules of courtroom procedure, evidence, and decorum.[33] Unreliable hearsay statements by agency workers are routinely admitted into evidence and relied upon. The statutory requirements for removal of children or termination of parental rights frequently are not followed.[34] Family litigants are often subjected to insulting remarks and lectures in the course of legal proceedings. See section C(2), supra. Indeed, full hearings held on removal or placement of children or on termination of parental rights typically resemble ex parte proceedings more than trials.[35]

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33. The Lassiter transcript is replete with such procedural defects. See Section D, infra.

34. See In re Amos H.H, 59 App. Div.2d 795 (3d Dept. 1977); In Re Guardianship of Denlow, 87 isc. 2d 410 (Fam.Ct. Kings County 1976).

35. See e.g. State v. Jamison, 444 P.2d 15 (Ore. 1968)

The practices described above, which are essentially extra-legal in nature, profoundly affect the legal processes by which parents lose their children for ever. These practices are beyond the capacity of unrepresented parents to comprehend, much less to address.

A knowledge of these practices is required for an understanding of the dynamics of termination proceedings and the development of an effective defense strategy. An attorney knows now to acquire such knowledge and this skill is as important as the marshalling of evidence, examination and cross-examination, and the presentation of legal argument. The parent alone can do none of this.

D. THE DIFFERENCE AN ATTORNEY COULD MAKE

Counsel for the parent in termination proceedings can significantly decrease the risk of an erroneous decision to terminate parental rights by developing and presenting defenses which the parent would be unlikely to recognize on her own, by insuring that the state's burden of proof is met and supported by reliable evidence, and by protecting the client against bias and impropriety. All three of these functions would have been performed routinely by counsel for Appellant had she been represented at trial. All three were well beyond the reach of what she could accomplish alone. And all three would have contributed substantially to the likely accuracy of the outcome of the proceeding.

1. Developing a Defense

The most important way in which Appellant's attorney could have decreased the risk of an erroneous termination of her rights as a parent was by developing her defenses and questioning

the jurisdictional basis of the case against her. Appellant clearly had no understanding of the standard under which her rights were being terminated and thus could neither identify nor develop her own defenses. The trial transcript suggests that she had a number of viable defenses.

The basis under the North Carolina statute, N.C. Gen. Stat. §7A-289.22, for terminating appellant's rights was that she had been found, three years before, to have neglected her child. The trial transcript suggests that Appellant could have moved to vacate the finding of neglect made against her on default in 1975.[36]

36. Appellant explained at trial that she hadn't understood why she was being asked to go to court (Tr. 31-33), that she had not gotten any written notice of the neglect charges, (Tr. 29-30) and that by the time she was notified by phone on the day of the hearing, she could not go because she had no one to care for her other children, and had no transportation available to get to court (Tr. 32) Furthermore, Appellant denied at trial all of the findings made against her in the neglect proceedings. She said she had provided William with medical care and taken him to the doctor, and that she had papers to prove it (Tr. 27) that she had never misappropriated the children's welfare check (Tr. 30-31), and that no one had ever pulled the baby's hair out. (Tr. 34-35) Her mother denied having complained about her (Tr. 48-49)

As part of its case for termination, the state alleged that Appellant had wilfully left her child in foster care for two years without improving the conditions which led to his original placement, in spite of the deligent efforts of the Department of Social Services to reunite the family. The transcript suggeststwo defenses to this charge. First, for two years before the order terminating her rights, Appellant was in prison. She was unable to take any steps to improve her condition while she was incarcerated. During her imprisonment, she made a concerted, if futile, effort through her mother to have her child removed from foster care and sent to live with her mother.[37] There is no evidence of any kind in the record to indicate that there was anything about Appellant's mother's home that would make it suitable for Appellant other children, but unsuitable

37. Trial Tr. 51-52.

for this child. Counsel for Appellant would have attempted to show that placement of this child with his grandmother and sisters was the least detrimental alternative given his mother's incarceration and the avowed preference of the state for keeping families together.

Second, the Durham County Department of Social Services did not make diligent efforts to reunite the family. The social worker who testified at the hearing said she visited Appellant only once, and that visit was not to attempt reunion but to inform appellant of the agency's intention to terminate her parental rights.[38]

No one at the trial developed any of these defenses the way appellant's counsel would have. Appellant herself was unable to do so, and the state and the courts were primarily concerned with concluding the hearing and entering an order of termination as quickly as possible.

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38. Trial Tr. 15

Proceedings to terminate parental rights are not a domestic relations matter to be left to the broad discretion of state courts. Rather, they are complex litigations involving the ultimate intrusion of the state in the private life of the family. The North Carolina termination statute contemplates multiple grounds for terminating parental rights. N.C. Gen. Stat §7A-289.32. The statute incorporates the entire child dependency scheme in its scope. See N.C. Gen. Stat. §7A-289.32 (2). Analyzing a statutory scheme of similar complexity, the Unites States Circuit Court for the Fifth Circuit commented on the parents'need for an attorney in Florida dependency proceedings:

> "The dependency proceedings is complex in terms of the procedural,evidentiary and substantive law applicable to the hearing. In addition to this confusion legal framework, the parent is confronted with "the full panolpy of the traditional weapons of the state." Davis v. Page, __ F.2d __, (5th Cir. 1980)

In Florida, termination of parental rights is one of the many dispositional alternatives in a dependency proceeding. (Fla. Stat §39.11 (4).

Although separated into a discrete statutory provision, North Carolina's termination statute contemplates proceedings of analogous complexity both procedurally and substantively. Compare Fla. Stat. Ch.39 with N.C. Gen. Stat. Sec. 7-A.

The Davis court concluded that the value of counsel in dependency proceedings in Florida was "inestimable," just as necessary as counsel in a criminal case. Id, _ F2d __ (citing Powell v. Alabama, 287 U.S. 45 (1932).

2. Insuring that the State's Burden of Proof Is Met and Supported by Reliable Evidence.

The parent appearing in court alone, like Appellant, is likely to be confused, frightened, and angry at the prospect of losing a child forever.[39]

She is "little more than a spectator," Davis v. Page, 442 F. Supp. 258,260-61 (1977) affd, _ F2d _ (5th Cir.1980). On the other side is a state agency,

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39. See Trial Tr. 32, 34.

represented by an attorney and a social worker for whom the termination proceeding is routine work.[40] The state's case is typically based on reports and professional opinions by state social workers and psychologists. The unrepresented parent often cannot even understand these reports, and is not able in court to question or rebut them.[41] Judges tend to rely heavily on the evidence, both fact and opinion, presented by agency case workers.[42]

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40. See State v. Jamison, 444 P.2d 15, 17 (Ore. 1968)

41. See e.g. Davis v. Page 442 F. Supp. 260 (S.D. Fla. 1977) aff'd - F2d - (5th Cir. 1980); State v. Jamison, supra, 499 P.2d at 19 ("for the indigent mother, however, the entire proceedings were incomprehensible.").

42. Family court judges identify with and take a protective attitude toward agency social workers who appear before them and place great weight on both the factual statments and the opinions of these workers. ABA Juvenile Justice Standards Project, Standards Relating to Counsel for Private Parties, 150,174,184.

However, the evidence presented by these case workers frequently lacks the most basic indicia of reiability or accuracy. The most important piece of evidence usually presented by the state in a termination proceeding is the agency's case record, which is either introduced into evidence or used by the social worker as the basis for her testimony.[43] The function of the attorney is to test the contents of the record for reliability and to prevent the introduction of "random irresponsible material beyond the reach of the usual tests for accuracy." In Re Leon R.R.,48 N.Y 2d 117 (1979).

Had Appellent been represented by counsel, her attorney could have, through evidentiary objections and cross-examination,

43. About half of the state's testimony at the Appellant's trial was simply recitation from the case record. (Trial Tr. 9-19).

placed the case record and the testimony of the social worker in perspective by giving the judge a basis upon which to evaluate its reliability. For example, counsel for Appellent would have probed for the names of the anonymous sources who convinced the social worker that Appellant's mother was not equipped to care for her grandson Billy.

Similarly, Appellant's attorney could have provided a basis for evaluating the opinions offered by the social worker by cross-examining her about both her professional qualifications and the foundation for her opinions. Both exercises would contribute significantly to the accuracy of the outcome of the proceeding, and both were clearly beyond the reach of appellant herself.

3. Protecting the Client Against Bias and Impropriety

One of counsel's major functions is to protect her client from bias and impropriety. This is particularly true of counsel for an indigent, minority client.

Counsel can limit the admission of irrelevant and prejudicial testimony by insisting on the duty of the court and parties to adhere to rules of law, can help the court to understand and empathize with the client's life circumstances, and can act as a buffer between the client adversary parties and witnesses

For example, had Appellant been represented by an attorney, the attorney could have tried to prevent prejudical testimony about her welfare status from entering the record, and could have helped her to explain the difficulties she encountered in visiting her child,[44] her belief that she was wrongfully imprisoned, and her strong desire to keep her child with her other children within her extended family.

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44. Counsel would also have tried to schedule visits between mother and child before the hearing.

One special source of bias against an unrepresented parent in a termination proceeding arises from the fact that the parent is in a very real sense, herself on trial. No matter what the standard under which the termination proceeding is conducted in a particular state, the parent's character and ability to be responsible for and care for children will always be in some sense at issue. The judge's personal observations of the parent in court will affect his decisions. If, as is usually the case, the unrepresented parent is unfamiliar with court procedures and so slows down the proceedings, there is a considerable likelihood that her lack of artfulness in court will weigh against her. Again, the Lassiter case is a good example. At trial the judge repeatedly snapped at Appellant and her mother to be quiet,[45] and on one occasion threatened to lock Appellant's mother up

45. Trial Tr. 13, 14, 24, 42, 53.

for speaking out of turn.[46] He criticized Appellant's inartful cross-examination,[47] and ultimately stopped it. Finally he expressed his exasperation at the inefficiency of the proceeding:

> I tell you what, lets just skip all this. You question her please.
> Just answer his questions. we'll be here all day at this rate. I mean, we are just wasting time
> Trial Tr. 52.

It has been the experience of Amici that the mere presence of an attorney representing a parent often alleviates the court's bias against the parent. The attorney's presence, perhaps because he or she is also a professional, seems to lend added credibility to the parent's cause. The attorney can also shield the parent from the risk of having her "character" judged by her ability to represent herself in a legal forum.

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46. Trial Tr. 14.
47. Trial Tr. 20-21, 24.

E. THE STATE'S INTEREST IN FAIR ADJUDICATION IS CONSISTENT WITH ITS INTEREST IN FAMILIES AND CHILDREN.

Had Appellant had counsel to represent her at trial, that counsel could have made a significant contribution to the fairness and the accuracy of the proceeding. The same is true of most termination cases. By minimizing bias against the parent, by pointing out the inherent weaknesses in the state's case in ways that the untrained, uneducated parent cannot, and by developing and presenting defenses which the parent herself may not recognize, the attorney can provide an important additional safeguard of the parent's basic rights to family integrity.

In so doing, the attorney would also be serving the interests of the state. The primary purpose of procedural protections in our judicial system is to insure the fairness and the accuracy of judicial determinations.

In re Gault, 387 U.S. 1 (1967), McKeiver v. Pennsylvania 403 US 528 (197]), Mathews v. Eldridge, 424 US 319 (1976). The state always has a substantial interest in the fairness and accuracy of its own adjudications. Stone v. Powell 428 US 465 (1976), Parham v. J.R. 422 US 584 (1979).

The state has a further strong interest in preserving and protecting families, in not breaking apart a family when such drastic action is unnecessary. Parham v. J.R. 422 U.S. 584 (1979); Stanley v. Illinois, 405 U.S. 645 (]972). As this court recognized in Stanley, the state which terminates parental rights unneccessarily spites its own articulated interests. The State of North Carolina has also, in its termination statute, made it a state goal to avoid unnecessary terminations:

> It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severence of a relationship with biological or legal parents. N.C. Gen. Stat. §7A-789.22(a).

Minimizing the risk of an unfair and unreliable decision to terminate parental rights through the provision of assigned counsel for parents would thus serve the interest of the state in fair adjudication as well as its interest in preserving families and protecting children.

The state has no interest in promoting terminations of parental rights and adoptions for their own sake. Indeed, in the absence of reliable proof that termination of parental rights is required to protect a child from serious long term harm which cannot be obviated by less drastic alternatives, such as placement of the child with relatives, the state may not prefer termination of parental rights and adoption--creatures of statute unknown at common law[48]--to the natural ties binding parents, children, siblings, and kin.

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48. See. e.g., Mnookin, Child-Custody Adjudication: Judicial Functions In the Face of Indeterminacy 39 J.L. and Contemp. Prob. 226, 245,n.95 (1975)

Given the overwhelming odds which face parents and families of children in foster case in termination proceedings, the risk that parental rights would not be terminated in the proper case is de minimus. Finally, the uncertain prospect of adoption for many children, and the fact that more and more often the state must support adopted childred financially through payment of an adoption subsidy, also favor careful adjudication.

Therefore the same attorney whose presence would add greater protection for the parent's rights, would also serve the state's interest by making the proceeding more accurate and decreasing the risk of unnecessary termination without impeding proper terminations. These state interests are more important than speed and efficiency or administrative cost.

F. What Process Is Due

When all the relevant characteristics of the termination proceeding are weighed and considered together, they require the conclusion that counsel must be provided for indigent parents faced with possible termination. The fundamental nature of the parent's interest in her relationship to her child, the momentous and grievous loss caused by the termination of the parent-child relationship, the formality and complexity of the termination proceeding, the very grave risk that a parent attempting to represent herself will be erroneously but permanently deprived of her child, the unquestionable value of counsel in preventing such a result, and the fact that the state's interest in preserving families and protecting children will be advanced by fair and reliable adjudication, all make such a conclusion inescapable.

The opportunity to be heard is the "fundamental requisite" of due process of law, Goldberg v. Kelly, 397 U.S. 254, 267 (1970), quoting Grannis v. Ordean, 234 U.S. 385,394 (1914). Appellant herein was given a hearing prior to the termination of parental rights. But that hearing utterly failed to satisfy the requirement that the opportunity to be heard be granted not only at a meaningful time but also in "a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,552 (1965).

An ostensible opportunity to be heard is fatally deficient if it is not "tailored to the capacity and circumstances of those who are to be heard." Goldberg v. Kelly, 397 U.S. 254, 268-269 (1970), quoted in part in Mathews v. Eldridge, 424 U.S. 319,349 (1976). Many of the indigent parents whose parental rights the State seeks to terminate have limited schooling and are totally un-

sophisticated in legal matters. The transcript of the termination hearing below shows beyond a doubt that Appellant had no idea of what was expected of her at that hearing or of what rights and choices she might have exercised to her benefit. The hearing at which Appellant's rights to her son were cut off afforded her a hollow formality; it failed to provide her with the constitutionally guaranteed "meaningful" opportunity to be heard.

This Court has concluded that, absent a knowing and intelligent waiver, no criminal defendant can be imprisoned for any offense unless he has been represented by counsel at his trial, Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Argesinger v. Hamlin, 407 U.S. 25 (1972).

In those instances in which the Court has examined an indigent's right to have counsel appointed in a non-criminal

proceeding, the decisions have rested on whether the proceedings resembled criminal proceedings in purpose, structure, and possible outcome. Whether the proceedings were denominated civil or criminal has not been dispositive, Specht v. Patterson, 386 U.S. 605 (1967); In re Gault, 387 U.S. 1 (1967).

The nature and consequences of a proceeding for termination of parental rights closely parallel those of a criminal case: the permanent loss of a child is at least comparable in severity to incarceration.

> .....Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. Davis v. Page, __F.2d__(5th Cir. 1980); decided June 6, 1980.

To be meaningful the right to counsel for indigent parents in termination proceedings must include the concomitant right to an assigned counsel. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); In re Gault, 387 U.S. 1 (1967). The reason is obvious and has been long recognized by this Court: a vision of equal justice demands that the poor have an opportunity to receive the same treatment in the courts as the wealthy. Edwards v. Califaornia, 314 U.S. 160 (1941); Griffin v. Illinois, 351 U.S. 12 (1956). And without the right to assigned counsel the indigent will not be provided the services of an attorney. Such assignment is the only way that representation can be ensured since poor persons civil legal needs have been and remain unserved.*

*An examination of what legal services are available to the poor shows that their legal needs have been unmet. In 1977, the General Accounting Office (GAO) surveyed a number of poor households about the incidence of legal problems and found that sixty-four per cent of those who had a legal problem received no legal assistance at all, see Free Legal Services for the Poor - Delivery Can be Improved Through Increased Coordination, Community Legal Education, and Outreach, Appendix III, Results of GAO'S Potential Client Interview, Washington D.C., 1978, pp. 95-99.

The Legal Services Corporation has estimated that its programs in fiscal 1980 are only able to service one third of the estimated six million legal problems of poor civil litigants. See, The Legal Services Corporation and the Activities of Its Grantees, September, 1979, at p. 17. Indeed, as Amici's experience shows legal services offices in New York City and throughout the country ordinarily turn away numerous income eligible clients because of the office's already staggering caseloads.

The G.A.O. report on Free Legal Services for the Poor notes that pro bono and other legal resources only served a very small additional part of indigents legal needs, G.A.O. Report, supra, pp. 5-6, Appendix I, p. 24.

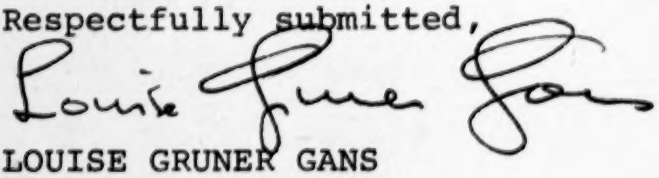
Appointment of counsel should be mandated in every case absent a knowing and intelligent waiver of that right. The factors that this Court has noted as requiring an absolute right to counsel in criminal cases are present in termination proceedings--opposing counsel, formal rules of evidence, procedural rights, and an adversarial format, Gideon v. Wainwright, 372 U.S.335 (1963). Unlike Gagnon v. Scarpelli, 411 U.S.778 (1973) where a right to counsel in probation and parole revocation cases was recognized on a case by case basis only, partially because of the limited due process rights of prisoners, the rights of parents in termination proceedings are fundamental and must be accorded the fullest protection.

CONCLUSION

For all of the foregoing reasons, the judgment of the North Carolina Court of Appeals should be reversed.

Dated: November 20, 1980

Respectfully submitted,



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No. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,
Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,
Respondent.

(IN THE MATTER OF WILLIAM L. LASSITER)

On Writ of Certiorari to the North Carolina Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Legal Aid and Defender Association (hereinafter referred to as "NLADA") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

PREVIOUS PAGE WAS BLANK

The interest of NLADA in this case arises from NLADA's unique role vis-a-vis the interests of indigent persons. NLADA is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel because of their indigency. Its members include the great majority of legal services agencies throughout the United States, as well as public defender offices, coordinated assigned counsel systems, and private practitioners.

NLADA joins petitioner in seeking reversal of the decision of the North Carolina Court of Appeals holding that petitioner's constitutional rights were not violated by the trial court's failure to appoint counsel for her in a termination of parental rights proceeding. Because the primary purpose of NLADA is to ensure that the poor have access to equal justice, and because the members of NLADA represent many indigents in all kinds of proceedings, including those involving termination of parental rights, NLADA has a unique perspective from which to present to this Court arguments concerning the need and importance of counsel in these proceedings and the inability of legal services programs to meet the needs of indigent parents in such proceedings.

Respectfully submitted,

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(IN THE MATTER OF WILLIAM L. LASSITER)

On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF FOR AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

INTEREST OF THE AMICUS

The National Legal Aid and Defender Association (hereinafter referred to as "NLADA") is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel

because of their indigency. Its members include the great majority of free legal services agencies throughout the United States, as well as public defender offices and coordinated assigned counsel systems. NLADA also includes two thousand individual members, most of whom are private practitioners.

NLADA joins petitioner in seeking reversal of the decision of the North Carolina Court of Appeals which held that the constitutional rights of petitioner, an indigent person, were not violated by the trial court's failure to appoint counsel for her in a proceeding which resulted in the termination of her parental rights. Because the primary purpose of NLADA is to ensure that the poor have access to equal justice, NLADA, on behalf of the many clients of its members, has a unique interest in ensuring that poor persons obtain appointed counsel in termination of parental rights proceedings. This is especially true since the limited resources of NLADA members make it impossible for them to represent all indigent parents in need of counsel. NLADA has an interest in protecting the rights of clients and potential clients of member programs and in ensuring that they are denied no rights because of their proverty. NLADA therefore submits this brief in support of poor persons' rights to appointed counsel in termination of parental rights proceedings.

SUMMARY OF ARGUMENT

Indigent parents who are subjected to proceedings in which the state seeks to terminate their parental rights must be provided court appointed counsel at public expense. Appointed counsel is critical to a trial that comports with the concern for basic fairness inherent in a system of due process of law.

The family unit is "perhaps the most fundamental social institution of our society." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). Because the integrity of the family unit is of such importance, it is protected from state interference as a

liberty interest under the Due Process Clause of the Fourteenth Amendment.

Inasmuch as the parent-child relationship is a protected liberty interest, that relationship can be severed by action of the state only in the presence of certain procedural safeguards. Procedural due process requires appointment of counsel at trial for those parents who cannot afford to hire counsel. The parents' interest, the right to family integrity, is fundamental under our scheme of protected liberties. The appointment of counsel is crucial to the protection of the parents' liberty interest, and, absent appointed counsel, there is a tremendous risk that termination of parental rights will erroneously occur. On the other hand, the sole cognizable state interest in preventing the appointment of counsel is to save governmental resources, primarily money. This state interest is an insufficient justification to override the fundamental rights of parents.

In the criminal law context, this Court has found the appointment of counsel for indigent defendants to be critical to the protection of cherished liberties. The impact of a civil proceeding where the result is total and permanent loss of one's children is no less serious than the impact of most criminal proceedings on personal liberty.

Finally, the failure of this Court to recognize a constitutionally based right to appointed counsel will inevitably result in large numbers of parents being deprived of one of our most cherished liberties without the protection of legal representation. The present resources for providing no-cost representation to poor parents faced with termination of parental rights proceedings are inadequate to assure that all, or even most, will be represented.

Accordingly, the decision of the North Carolina Court of Appeals denying a right to court appointed counsel for indigent parents in termination of parental rights proceedings is incorrect and contrary to the decisions of this Court and must be reversed.

ARGUMENT

I. PARENTS' INTERESTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS ARE LIBERTY INTERESTS ENTITLED TO THE HIGHEST PROTECTION UNDER THE DUE PROCESS CLAUSE

The appeal in this cause concerns complete and irrevocable termination of an indigent parent's interests in her child, and whether the Due Process Clause of the Fourteenth Amendment required that counsel be appointed for her in the termination hearing. It is axiomatic that procedural due process protections must be afforded only if a liberty or property interest is present. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). The interests destroyed by a termination of parental rights proceeding are liberty interests entitled to the highest protection.

This Court has noted that the family is "perhaps the most fundamental social institution of our society." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). A termination of parental rights proceeding, present in sundry forms in every state, destroys that fundamental social institution.[1]

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[1] A representative sampling of state termination of parental rights standards can be found by examining, *e.g.*, ARIZ. REV. STAT. §8-532, *et seq.*; CAL. CIV. CODE §232, *et seq.* (West); COLO. REV. STAT. §19-11-101, *et seq.*; CONN. GEN. STAT. §17-43(a), *et seq.*; DEL. CODE ANN. tit. 13 §110, *et seq.* (1978 Supp.); D.C. CODE ANN. §16-2353, *et seq.* (1978 Supp.); GA. CODE ANN. §24A-3201, *et seq.* (1980 Supp.); HAWAII REV. STAT. §571-61, *et seq.* (1975 Supp.); IDAHO CODE §16-2001, *et seq.*; IND. CODE §31-6-5-1, *et seq.* (1980 Supp.); IOWA CODE ANN. §232.109, *et seq.* (1980 Supp.) (West); KY. REV. STAT. §199.60, *et seq.* (1980 Supp.); MINN. STAT. ANN. §260.221, *et seq.* (1980 Supp.) (West); MO. ANN. STAT. §211.447, *et seq.* (1980 Supp.) (Vernon).

The result is both final and irrevocable. If parents have their rights terminated they lose all their rights and interests in the children involved. Thus, not only are their custodial rights removed, but all other rights, duties and responsibilities emanating from the parent and child relationship are severed. The parents are left in the position as if they had never had the children. And, of course, the children are left as if they had never had natural parents.[2] Thus, the termination decision sounds the death knell for the relationship. While the legal effects of the termination can be described briefly, the actual ramifications of the termination of parental rights are devastating for all parties involved, including the children. It is certainly not exaggeration to describe the forced break-up of this most fundamental of all human relationships as worse than most terms of incarceration. *See* part II, *supra*. It is therefore to be expected, that when the state intrudes upon the family relationship, and separates parent and child, the "effect on the child's developmental progress is invariably detrimental."[3] The developmental scarring, which is most

[2] For example, the Indiana termination of parental rights statute, IND. CODE §31-6-5-1, *et seq.* (1980 Supp.), explicitly lays out the dire consequences emanating from the judicial decision to terminate parental rights.

> When the juvenile court terminates the parent-child relationship, all rights, powers, privileges, immunities, duties, and obligations (including any rights to custody, control, visitation, or support) pertaining to that relationship are permanently terminated, and the parent's consent to the child's adoption is not required.

IND. CODE §31-6-5-6(a) (1980 Supp.).

[3] J. Goldstein, A. Freud and A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 9 (1979) (footnote omitted). The social scientists, social workers, psychologists and psychiatrists operating in this area acknowledge the fact that:

> the biological family of father, mother and their children constitutes the natural means of providing family life for children, and should for that reason be fostered and preserved whenever possible.

Child Welfare League of America, STANDARDS FOR ADOPTION SERVICE 9 (Revised ed. 1978). *See Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

(Footnote continued on following page)

likely to occur to children separated before the age of six, with the exception of the newborn, can take the form of a wide range of psychological problems, e.g., 1. a freezing of personality development at the point of separation; 2. an excessive distrust of people and a reluctance or inability to enter into close relationships; 3. self defeating behavior; or, 4. a tendency of the child upon reaching adulthood, to reproduce the problems in her own children.[4] Even where a family might appear to be one needing state intervention,

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continued

The desire to protect the natural family whenever possible stems from more than a general feeling that parents and children should be together. It stems from a professional recognition that the severence of the relationship can gravely and permanently harm not only the parents, but the child.

> It is becoming increasingly clear that when a child is cut off from his biological family system there is for the child, the parents, and the families involved a deep mutual sense of personal loss....[Indeed, research supports the hypothesis that] persons who experience unresolved emotional cut-offs from significant others are persons at higher risk emotionally and psychologically than those who have resolved such cut-offs.

Colon, *Family Ties and Child Placement*, 17 FAM. PRAC. 289, 290 (1978). For some:

> studies have indicated that adoptive families have unique strengths and weaknesses, not all of which operate to the child's advantage. Many researchers feel that the adopted child, no matter how secure, is bound to suffer from "geneological bewilderment": that is, he may feel a lingering sense of rejection stemming from his separation from his biological parents.

M. Benet, THE POLITICS OF ADOPTION 19 (1976). *See also* Bradley, *The Relationship of Early Maternal Separation to Borderline Personality in Children and Adolescents: A Pilot Study*, 136 AM. JOURN. OF PSYCHIATRY 424 (1979); Littner, *The Challenge to Make Fuller Use of Our Knowledge About Children*, 53 CHILD WELFARE 287 (1974); N. Littner, SOME TRAUMATIC EFFECTS OF SEPARATION AND PLACEMENT (1973); Prugh and Harlow, *"Masked Deprivation" in Infants and Young Children* in DEPRIVATION OF MATERNAL CARE 9 (World Health Organization 1962).

[4] N. Littner, SOME TRAUMATIC EFFECTS, *supra*, note 3 at 20. Littner, CHILD WELFARE, *supra*, note 3 at 288-291.

the parent-child relationship retains its fundamental importance for the family members, and the dangers inherent in termination remain.[5] Thus, a decision terminating parental rights is one with grave psychological and social ramifications, as well as grave legal consequences.

The obvious importance of the parent-child relationship has been repeatedly recognized by this Court. The Court has held that the parent-child relationship, which is obliterated by a termination of parental rights, is part of the liberty protected by the Due Process Clause. As far back as 1923, this Court recognized that the liberty in the Due Process Clause "denotes...the right of the individual to...establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Since that time the importance of the family has repeatedly been emphasized by this Court. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

It is established, then, that "the relationship between parent and child is constitutionally protected." *Quilloin*,

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[5] By its intrusion the state may make a bad siutation worse; indeed, it may turn a tolerable or even a good situation into a bad one.

> The intact family offers the child a rare and continuing combination of elements to further his growth: reciprocal affection between the child and two, or at least one, caretaking adult; the feeling of being wanted and therefore valued; and the stimulation of inborn capacities. Available alternatives too often fail to offer the whole series, and accordingly leave one or the other other part of the child's personality without developmental support. Recognition of these shortcomings should alert the law to ask in every case whether removal from an unsatisfactory home is the beneficial measure it purports to be.

J. Goldstein, A. Freud and A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 13 (1979) (footnotes omitted). It should be noted that once parental rights are terminated there are often no real "available alternatives" and the child is left to drift without ever securing an adoptive placement. *See* note 9, *infra*.

434 U.S. at 255.[6] The constitutional rights implicit in this relationship have been found to emanate from the Due Process Clause, the Equal Protection Clause, and the Ninth Amendment. *Meyer v. Nebraska*, 262 U.S. at 399; *Skinner v. Oklahoma*, 316 U.S. at 541; *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). Generally, the right to family integrity is described as being subsumed in the "right of personal privacy." *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977).[7] The rights included within the zone of privacy protecting each person must be described as "'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)." *Roe v. Wade*, 410 U.S. at 152. As a fundamental right, the interests existing between a parent

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[6] The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential", *Meyer v. Nebraska*, 262 U.S. 390, 399...(1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541...(1942), and "[r]ights far more precious...than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Indeed, only last term this Court noted that:

> the "liberty" protected by the Due Process Clause of the Fourteenth Amendment includes not only the freedoms explicitly mentioned in the Bill of Rights, but also freedom of personal choice in certain matters of marriage and family life.

Harris v. McRae, _____ U.S. _____, 100 S.Ct. 2671, 2686 (1980) (footnote omitted).

[7] "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution....Those decisions...make it clear that the right has some extension to activities relating to...family relationships...and child rearing and education." *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

and child are not only entitled to cognizance under the Due Process Clause, but are also entitled to the highest protections afforded under the Constitution. *Id.* at 156.[8]

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT COUNSEL BE APPOINTED AT PUBLIC EXPENSE TO REPRESENT AN INDIGENT PARENT IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING

The fact that due process must accompany the attempts by the state to terminate the relationship between parent and child does not resolve the more difficult question of the extent to which procedural protections must be made available in such cases. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895

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[8] The Court in *Roe*, 410 U.S. at 155 noted that:

> [w]here certain "fundamental rights" are involved the Court has held that regulation limiting these rights may be justified only by a "compelling state interest"...and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

Various state courts have characterized the parent's interest in the most compelling terms: "...more precious to many people than the right of life itself." *In re Luscier*, 84 Wash.2d 135, 524 P.2d 906, 908 (1974); "...a sanction more severe than imprisonment." *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140, 144 (S.Ct. W.Va. 1974); *Danforth v. State Department of Health and Welfare*, 303 A.2d 794, 800 (S.Ct. Me. 1973); "...one of the most drastic actions the State can take against its inhabitants." *State v. Jamison*, 251 Or. 114, 444 P.2d 15, 17 (1968).

See also In re Appeal in Pima County, Juvenile Action No. J-46735 v. Howard, 112 Ariz. 171, 540 P.2d 642 (1975); *Regenold v. Baby Fold, Inc.*, 68 Ill. 2d 419, 369 N.E.2d 858 (1977), *appeal dismissed*, 435 U.S. 963 (1978); *In re Brehm*, 3 Kan.App.2d 325, 594 P.2d 269 (1979); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976); *In re Welfare of Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1975).

(1961). *See also Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). This Court has consistently followed a three-pronged analysis in determining how much process is due under the Fourteenth Amendment where protected liberty interests are at stake:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also Parham v. J.R.*, 442 U.S. 584, 599-600 (1979); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 848-849 (1977). The application of this tripartite test to termination of parental rights demonstrates that court appointed counsel at public expense for indigent parents is an essential, constitutionally required aspect of due process of law.

First, the private interest at stake in a termination of parental rights proceeding is the parental right to care, custody and companionship of minor children. The parents' interest is among the most fundamental recognized by our society and by our legal system. *See* part I, *supra*.

The interest of the state in termination of parental rights proceedings is qualitatively less substantial than the parents' interest. While the precise authority for termination of parental rights varies somewhat from jurisdiction to jurisdictioin, the basic concern of the state is

to make provision, in its *parens patriae* capacity, for those children who are bereft of parental care for any reason, whether it be absence, neglect or abuse. However, there is no guarantee that a child whose biological parents' rights are terminated will end up in a secure, stable placement.[9]

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[9] Not all children whose parental rights are terminated are readily adoptable. There are many hard to place children, particularly older children, minority children and children with handicaps, who remain in institutions and foster homes even after they have been freed for adoption by termination of parental rights proceedings. *See* A. Kadushin, CHILD WELFARE SERVICES 582-595 (2d ed. 1974); New York City Comptroller's Office, THE CHILDREN ARE WAITING: THE FAILURE TO ACHIEVE PERMANENT HOMES FOR CHILDREN 7 (1977); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 673-674 (1976). One group has estimated that "[a]t least 100,000 children wait for families because finding homes for children who are older or who have physical or other handicaps has for a variety of reasons been fraught with difficulties." Child Welfare League of America, STANDARDS FOR ADOPTION SERVICE 8-9 (Rev. ed. 1978). Recent literature shows that children in the foster care system tend to remain in foster placements for inordinately long periods of time. *See* Children's Defense Fund, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE 30-33 (1978); Fanshel, *Status Changes of Children in Foster Care*, 55 CHILD WELFARE 143, 144-45 (1976); Fanshel, *The Exit of Children From Foster Care: An Interim Research Report*, 50 CHILD WELFARE 65, 66-67 (1971); A. Kadushin, *supra* at 454-455; H. Maas and R. Engler, CHILDREN IN NEED OF PARENTS (1959); Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 (3) LAW AND CONTEMP. PROBS. 226, 273-277 (1975); Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 610-613 (1973); New York City Comptroller's Office, *supra* at 7-12; Rein, Nutt and Weiss, *Foster Family Care: Myth and Reality* in CHILDREN AND DECENT PEOPLE 37-39 (Schorr ed. 1974); E. Shermin, R. Neuman and A. Shyne, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES 3 (1973); Wald, *supra* at 662-663 (1973). *See also Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 835-836 (1977). For example, in New York City alone, of children in foster care, adoption is the objective for 22.3% of the children, and yet only 3.9% of the children in care are in preadoptive or adoptive homes. The mean length of time for children in foster care in New York

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Thus, the state interest in establishing permanent, adequate homes for children is by no means co-extensive with its efforts to terminate parental rights.[10]

The abstract interest of the state in providing stable placements for children must be examined in the context of the procedure in question in order to determine the significance of the procedure from the state's perspective. When the right to court appointed counsel is viewed from the state's perspective, it is clear that the state's interest is enhanced by the procedure in question or at a minimum falls into insignificance. Without question, the state has no legitimate, cognizable interest in terminating the rights of parents who do not come within the scope of the appropriate statutory standards for terminating parental rights. In fact, the state has an affirmative obligation to make efforts to provide for the reunification of the natural

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City is five years. Citizens' Committee for Children of New York, Inc., THE CITY AND ITS CHILDREN: A VIEW OF HOW NEW YORK SERVES ITS CHILDREN IN 1979 45-48 (1980).

Additionally, children in foster placements do not necessarily experience continuity of care, but may be, and frequently are, shifted from short-term placement to short-term placement, with little regard for the child's need for stable relationships. *See* Children's Defense Fund, *supra* at 40-41; A. Kadushin, *supra* at 457, 462; Mnookin, *Child Custody Adjudication*, *supra* at 273; Mnookin, *Foster Care*, *supra* at 612; Wald, *supra* at 645-646, 671.

[10] Indeed, various authorities have contended that termination of parental rights should not take place unless there is a reasonable probability that an alternate, permanent placement is available for the child. In cases where no stable, alternate placement for the child can be expected, parental rights should be left intact as the natural family remains a potential future resource for the child's nurturance. *See* Wald, *supra*, note 9 at 699; American Bar Association/Institute for Judicial Administration, JUVENILE JUSTICE STANDARDS PROJECT; STANDARDS ON ABUSE AND NEGLECT §8.4(D) (1977).

family.[11] This Court has consistently recognized that under our system of adversarial jurisprudence, the presence of counsel to represent all parties interested in a proceeding contributes substantially to the accuracy of the fact-finding process and the legal conclusions to be drawn from the facts. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Douglas v. California*, 372 U.S. 353, 357 (1963); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Because of the impact counsel for all parties has upon the integrity of the court's decision-making process, appointment of counsel for parents who would otherwise go unrepresented actually has a salutary effect upon the shared interest of parents and state in avoiding erroneous terminations of parental rights.[12] Thus, while the state has an interest in assuring

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[11] 42 U.S.C. §601 provides that federal funds be made available to states which have submitted, and have had approved by the Secretary of the Department of Health and Human Services, a state plan for aid and services to needy families with children, the purpose being:

> to help maintain and strengthen family life and to help such parents or relatives to attain or retain capacity for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection....

All fifty states, including North Carolina, have elected to participate in this program. U.S. Department of Health and Human Services, CHARACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER THE SOCIAL SECURITY ACT TITLE IV-A (1980). *See also* 42 U.S.C. §671(a)(45) [effective October 1, 1983]; *In the Matter of Leon R.R.*, 48 N.Y.2d 117, 397 N.E.2d 374, 412 N.Y.S.2d 474 (1979); American Bar Association/Institute for Judicial Administration, *supra*, note 10 at §6.5(B)(1).

[12] The presence of counsel for the parents has a substantial impact upon the results that are achieved. A study has shown that in temporary custody proceedings brought against parents by state welfare authorities, results beneficial to the continuing unity of parent and child were highly correlated with the presence of counsel on behalf of the parents. Note, *Representation in Child Neglect Cases: Are Parents Neglected?*, 4 COLUM. J. LAW & SOC. PROB. 230, 242-243 (1968). This has led one commentator to observe:

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stable and secure placements for the children in its boundaries, that interest is enhanced by court procedures that provide a safeguard against poor parents and children being unnecessarily deprived of their relationships with each other. At the very least, the state's *parens patriae* interest is totally irrelevant to the issue of court appointed counsel.

The only legitimate, cognizable interest the state has in denying counsel to parents in termination of parental rights cases is to save money and other state resources. However, this Court has consistently rejected economic considerations as adequate justification for withholding procedures necessary to protect the fundamental rights of citizens. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970). Likewise, it is arguably quicker, and therefore more efficient, to terminate the rights of parents in the absence of a spirited defense put on by competent legal counsel. But considerations of efficiency hardly create a state interest of sufficient magnitude to allow the trampling of rights as important as those that make up the parent-child relationship.

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process

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> Since there is no evidence indicating that the average respondent who can retain counsel is better or less neglectful than one who cannot, the conclusion seems inescapable that a significant number of cases against unrepresented parents result in findings of neglect solely because of the absence of counsel. In other words, assuming a basic faith in the adversary system as a method of bringing the truth to light, a significant number of neglect findings (followed in many cases by a taking of the child from his parents) against unrepresented indigents are probably erroneous. It would be hard to think of a system of law that works more to the oppression of the poor than the denial of appointed counsel to indigents in neglect proceedings.

Note, *Child Neglect: Due Process For the Parent*, 70 COLUM. L. REV. 468, 476 (1970).

> Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. at 656. Thus, when measured against the competing interests of parents, the state interest in saving funds and operating efficiently is *de minimus*.

The third aspect of due process analysis is to consider the importance of the procedure in question as a safeguard against erroneous deprivations of fundamental rights. Representation of counsel throughout a termination of parental rights proceeding is of inestimable importance in protecting indigent parents against the erroneous and ill-considered severing of the relationship between biological parent and child. Without the protection of a trained legal advocate, the probability of erroneous determinations is great.

Proceedings to terminate parental rights are extremely complex. The statutory standards for the termination of parental rights vary somewhat from state to state, but it is characteristic of these standards to require the court to make its determination on the basis of complicated factual issues that require close analysis of human behavior.[13] Indeed, this Court has recognized the importance of

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[13] *See* note 1, *supra*. The North Carolina statute, under which the petitioner's parental rights were terminated in this case, is illustrative of this point:

> The court may terminate the parental rights upon a finding of one or more of the following:
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> * * *
>
> (3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years

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appointed counsel in cases where the factual determinations involved are complex. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). Whether termination of parental rights is in the best interest of the child, the ultimate inquiry in any termination of parental rights proceeding, is in itself an issue of unfathomable complexity.

Often, termination of parental rights proceedings focus on such issues as the parenting skills of the parents, the medical or emotional needs of the child, the quality of the relationship between the parent and child, or the mental fitness of the parent. The adequacy of efforts by social service personnel to assist parents in alleviating unacceptable home conditions is also frequently open to inquiry in termination proceedings. These are all issues that call for, and frequently involve, the testimony of expert witnesses such as medical doctors, psychologists, and social workers, in addition to the technical records used by these professionals.[14] In this connection, the unrepresented

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> to the diligent efforts of a county department of social services, a child-caring institution or licensed child placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.
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> * * *

N.C. GEN. STAT. §7A-289.32 (1979 Supp.).

[14] *See, e.g.*, the evidence submitted to the court in *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973), which consisted primarily of the testimony of the county public assistance director and three caseworkers. *Id.*, 208 N.W.2d at 261.

> Parents most often involved in neglect and termination proceedings are usually the least equipped, in terms of intellectual and emotional resources, to respond in such proceedings.

Reist v. Bay County Circuit Judge, 396 Mich. 326, 241 N.W.2d 55, 63-64. (1976). *See also Crist v. Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203, 210 (Law Div. 1974), *aff'd.*, 135 N.J. Super. 573, 343 A.2d 815 (App. Div. 1975).

> The indigent are frequently the least able to cope with government in its official functions. *See* Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966). The case at bar was routine for the welfare workers and other juvenile court staff. For the indigent mother, however, the entire proceedings were incomprehensible.

State v. Jamison, 251 Or. 114, 116-117, 444 P.2d 15, 17 (1968).

parent is at a two-fold disadvantage. First, it is unreasonable to expect the parent acting *pro se* to perform an adequate job of testing and probing the expert testimony of the state. The average lay person, untrained in the skills of cross-examination and having little familiarity with these areas of expertise, stands helpless before the intimidating authority of such professionals.[15] Second, the unrepresented poor parent is almost always without resources, financial or otherwise, to marshall expert testimony and documentary evidence in support of maintaining the parent-child relationship. In this connection, the facts of this case clearly demonstrate that appointed counsel is an essential of due process. Abby Gail Lassiter was imprisoned at the time of, and prior to, trial. Under those circumstances, the preparation of a meaningful defense, absent other assistance, was impossible.

The parent stands against a formidable opponent in a termination of parental rights proceeding. The state, as in this case and most such cases, is represented by counsel and has available the resources of the petitioning welfare or social services agency. These resources include the assistance of trained social workers, the funds or other means to secure documentary exhibits and the assistance of other trained professional personnel, and the sophistication to control the course of the proceedings. Also, the state has typically processed hundreds or thousands of these cases and therefore has the advantage of considerable experience at presenting any given case to a known judge in the most favorable light.

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[15] This is well illustrated by the court's observations in *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968):

> Without counsel, the informality usually associated with ex parte hearings prevailed. The juvenile court was led to proceed on the basis of incompetent evidence and evidence that had remote, if any, connection with the issues made up by the petition.

Id., 444 P.2d at 17.

By way of contrast, the parent is generally ill-educated, poor and lacking in the skills necessary to prepare an adequate defense.[16] In a termination of parental rights proceeding, the parent is faced with the need to make evidentiary objections, cross-examine witnesses, subpoena witnesses and exhibits, and present a coherent view of the facts supporting the parent's position through competent evidence. Even to a trained attorney, these tasks stand as significant challenges. The indigent parent, faced with these insurmountable obstacles, has no chance of salvaging the legal relationship with his or her child unless the assistance of counsel is provided.

These factors point to an overwhelming disparity between the abilities of the petitioning agency and the unrepresented, natural parent to present their respective cases. The result is that the facts and the legal arguments growing out of those facts that are presented to the court will inevitably be one-sided. Therefore, given the complex nature of a termination of parental rights proceeding, it is clear that the lack of court-appointed counsel to represent the indigent parent creates a substantial risk that parental rights will be erroneously terminated.[17]

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[16] *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W. 2d 55, 63-64 (1976); *Crist v. Division of Youth and Family Services*, 128 N.J. Super. 402, 320 A.2d 203, 210 (Law Div. 1974); *State v. Jamison*, 251 Or. 114, 444 P.2d 15, 17 (Or. 1968). *See also* Jenkins, *Child Welfare As A Class Sytem* in CHILDREN AND DECENT PEOPLE 3, 11-12 (Schorr ed. 1974); Jenkins and Norman, FILIAL DEPRIVATION AND FOSTER CARE 25-30 (1972); Kay and Phillips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 733-739 (1966); Rein, Nutt and Weiss, *supra*, note 9 at 24-29. And *see generally* ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (Part I); 16 STAN. L. REV. 900 (Part II) (1964); 17 STAN. L. REV. 614 (Part III) (1965).

[17] The right of indigent parents to appointed counsel at trial in termination of parental rights cases has been established in a large number of jurisdictions by legislation or court decision. *See, e.g.*, ALA.

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The right of an indigent parent to court appointed counsel at trial in a termination of parental rights proceeding is one of first impression in this Court.[18] This Court has, of course, determined that court appointed counsel is required to represent the indigent defendant in a criminal proceeding where incarceration is the disposition.

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CODE §12-15-63; CAL. CIVIL CODE §237.5 (1980 Supp.) (West); COLO. REV. STAT. §19-11-103(2); D.C. CODE ENCYCL. §16-2304 (1978 Supp.) (West); GA. CODE ANN. §24A-2001 (1976 Rev.); IDAHO CODE §16-2009; IND. CODE §31-6-7-2(b) (1980 Supp.); IOWA CODE ANN. §232.113 (1980 Supp.) (West); KAN. STAT. ANN. §38-820 (1979 Supp.); KY. REV. STAT. §199.603 (1980 Supp.); LA. CIV. CODE ANN. art. 13:1602 (1980 Supp.) (West); MINN. STAT. ANN. §260.155 (West); MO. ANN. STAT. §211.562 (1980 Supp.) (Vernon); N.D. CENT. CODE §27-20-26; N.H. REV. STAT. ANN. §170-C:10; N.Y. FAM. CT. ACT §262(a)(iv) (1976-79 Supp.); OHIO REV. CODE ANN. §2151.352; OKLA. STAT. ANN. tit. 10, §1109 (West); OR. REV. STAT. §419.498; S.D. COMP. LAWS ANN. §26-8-22.2; VA. CODE §16.1-266 (1980 Supp.); WASH. REV. CODE ANN. §13.34.090; W.VA. CODE §49-6-2; *Matter of Chad S.*, 580 P.2d 983 (S.Ct. Okla. 1978); *Crist v. Division of Youth and Family Services*, 135 N.J. Super. 573, 343 A.2d 815 (App. Div. 1975); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968).

Several federal courts and a number of state courts have recognized the need for court-appointed counsel even in cases where the deprivation of child custody by the state is only temporary. *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980); *Cleaver v. Wilcox*, 499 F.2d 940 (9th Cir. 1974); *Smith v. Edmiston*, 431 F.Supp. 941 (W.D. Tenn. 1977); *Roe v. Conn*, 417 F.Supp. 769 (M.D. Ala. 1976) (court appointed counsel for child); *Crist v. Division of Youth and Family Services, supra; In re Welfare of Myricks*, 85 Wash.2d 252, 533 P.2d 841 (1974); *State ex rel. Lemaster v. Oakley*, 203 S.E. 2d 140 (W.Va. 1974); *In re Ella B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

[18] During the 1979 term, this Court granted certiorari on a case raising the right to court-appointed counsel for indigent parents on appeal from a decision terminating parental rights. *Matter of Otis*, ___ U.S. ___, *100 S.Ct. 262* (1979). That case however was vacated and remanded in light of a subsequent decision of the Ohio Supreme Court in *State ex rel. Heller v. Miller*, 61 Ohio St. 2d 6, 399 N.E.2d 66 (1980). *Id.*, 100 S.Ct. 1003 (1980).

Scott v. Illinois, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). This case, and termination of parental rights cases in general, present considerations that are as compelling as in the criminal law relative to the need for court appointed counsel. In termination of parental rights cases, as in criminal cases, the state is the prosecuting party. The individual subjected to either proceeding stands against the awesome power and resources of the government. In each instance, the indigent defendant is without any meaningful resources to resist, absent the assistance of competent legal counsel. While termination of parental rights cases are deemed non-criminal, the difference between labels of "criminal" and "civil" creates no substantive distinction in and of itself. In determining the parameters of due process, this Court has always looked beyond labels to the fundamental interests at stake. *In re Gault*, 387 U.S. 1, 49-50 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). In the criminal context, the interest at stake is personal liberty from physical restraint. Thus, the indigent person deprived of his physical freedom for even one day is entitled to court appointed counsel. *Scott v. Illinois*, 440 U.S. 367 (1979). While a day of jail time is a substantial deprivation of personal freedom, it is hardly a greater intrusion upon liberty than the total and permanent severing of a parent's right to the custody, care and companionship of his or her children. Indeed, only lengthy incarceration surpasses termination of the parent-child relationship as a deprivation of a fundamental liberty interest. *See* part I, *supra*.

In some respects, the need for a meaningful, counsel-assisted trial is more crucial in termination of parental rights cases than in criminal cases. The loss of liberty associated with a criminal conviction is frequently temporary, whereas the loss of liberty to a parent whose parental rights have been terminated is permanent and irrevocable—the lost liberty will not be restored with time. In a criminal case, a defendant has the important additional safeguards of the highest burden of proof in the

law and a right to a jury trial. As is commonly the case, the safeguard of a jury of peers is not available to parents in North Carolina who are subjected to termination of parental rights proceedings. N.C. GEN. STAT. §7A-289.30(d) (1979 Supp.). Additionally, the criminal burden of proof was not used to terminate parental rights in this case. N.C. GEN. STAT. §7A-289.30(e) (1979 Supp.). Typically, the standard of proof is either a preponderance of the evidence or clear and convincing evidence.[19] Furthermore, in a criminal case the statutory standard of conduct against which the defendant's conduct is measured is very clear, a specific criminal act is either committed or not.[20] By way of contrast, in termination of parental rights proceedings, the facts under scrutiny are not isolated acts, fixed in time, but complicated, on-going and inevitably imprecise patterns of relationships among parent, child, social service workers and other helping professionals.

A meaningful trial is crucial to the fundamental fairness of termination of parental rights proceedings. The interests of the parent are substantially more important than the interests of the state. In fact, the deprivation of liberty that occurs when parental rights are terminated is in many respects more intrusive than that which occurs in most criminal proceedings. In the absence of court appointed counsel, the unrepresented indigent parent runs a substantial risk that that most sacred of relationships, the bond between parent and child, will be

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[19] The standard of proof in termination of parental rights proceedings is presently under review by this Court. *Doe v. Delaware*, ___ U.S. ___, 100 S.Ct. 1336 (1980) *(probable juris. noted).*

[20] Not only do criminal statutes direct themselves at concrete, socially deviant types of conduct, thus providing a basis for statutory clarity, but the vagueness doctrine has been applied to strike down those criminal statutes that do not put the person of ordinary intelligence on notice as to what behavior will run afoul of the criminal law. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

erroneously destroyed. In light of these considerations, the procedural fairness required by due process dictates that indigent parents be constitutionally entitled to court appointed counsel to provide representation at trial.

III. THERE IS CURRENTLY AN INSUFFICIENT NUMBER OF FREE COUNSEL AVAILABLE TO REPRESENT INDIGENT PARENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS WITHOUT JUDICIAL APPOINTMENT

The primary resources for the non-appointive legal representation of indigents in civil proceedings, such as termination of parental rights, are the legal aid programs funded by the Legal Services Corporation (hereinafter "Corporation").[21] Respondent has implied that there is no need to find a right to appointed counsel in termination of parental rights proceedings because free counsel, presumably the programs funded by the Corporation, are available. Respondent's Brief in Opposition at 4. This is erroneous for a number of reasons.

It should initially be noted, if only briefly, that such an argument is meaningless given the constitutional issue presented to this Court. Abby Gail Lassiter did not have counsel appointed for her in her termination of parental rights proceeding, despite her indigency. Her rights were subsequently terminated. The issue of whether this violated Abby Gail Lassiter's Fourteenth Amendment rights must be decided regardless of whether she could have obtained counsel through the North Central Legal Assistance Program, or through any other means. However, it is also clear that the Corporation, and its grantee programs, do not have the capability to represent all indigent parents in termination proceedings.

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[21] The North Central Legal Assistance Program, referred to in Respondent's Brief in Opposition, is funded by the Legal Services Corporation. Legal Services Corporation, ANNUAL REPORT—FISCAL YEAR 1979 33 (1980).

The Corporation was established in 1974 pursuant to an act of Congress. 42 U.S.C. §2996, *et seq.* It is a non-profit, federally chartered corporation which is charged with distributing monies appropriated by Congress to grantee organizations which are to provide free legal assistance to low income persons. 42 U.S.C. §2996; 42 U.S.C. §2996f; 42 U.S.C. §2996i. The grantee organizations provide a wide range of civil legal assistance.[22]

In fiscal year 1980, the Corporation was appropriated $300 million by Congress.[23] This money was distributed to 321 grantee programs employing 5,028 attorneys.[24] The eligibility population, according to the 1970 Census, came to 29 million persons, not including an additional 1.5 million impoverished Native Americans and migrant farm workers.[25] This breaks down to approximately two attorneys for every 10,000 eligible clients.[26] These are clients who can and do present the attorneys with problems ranging from dissolution of marriage to landlord/tenant disputes requiring resolution using methods ranging from negotiation to litigation. *See* Legal Services Corporation, ANNUAL REPORT—FISCAL YEAR 1979 15-20 (1980). It is thus not surprising that the resources of the programs are

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[22] *See* 42 U.S.C. §2996f(b) for a listing of the limitations on representation of clients by grantees.

[23] Legal Services Corporation, NEWS 3 (September, 1980).

[24] Legal Services Corporation, SELECTED FUNDING AND STAFFING CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION—START OF 1980—A FACT BOOK 1 (1980).

[25] Legal Services Corporation, NEWS 2 (September, 1980). Eligiblity is based primarily on an income test with a maximum allowable income of no more than 125 percent of the Office of Management and Budget Official Poverty Line Threshold. 45 C.F.R. §1611.3(b).

[26] Legal Services Corporation, NEWS 3 (September, 1980).

strained. Indeed, a study sponsored by the American Bar Association produced data indicating that nearly 25 percent, or seven million, of the nation's poor face a civil problem each year. But Corporation grantee programs can handle less than 20 percent of these persons' legal needs.[27] Given this reality, it is impossible to argue that legal aid organizations funded by the Corporation can assume the role of representing all parents whose parental rights are sought to be terminated.

It should also be noted that the existence of the Legal Services Corporation and the grantee legal aid societies depends entirely upon continuing appropriations from Congress. If such appropriations would cease, no free legal representation could be provided in any cases, including termination of parental rights proceedings. It would certainly be shortsighted to expect that such a structure could uphold the constitutional interests involved in this cause. It is thus clear that only through judicial appointments of counsel can indigent parents in termination proceedings be assured of legal representation.

CONCLUSION

For the foregoing reasons, the judgment of the North Carolina Court of Appeals should be reversed.

Respectfully submitted,

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[27] Legal Services Corporation, NEWS 2 (September, 1980).

NO. 79-6423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ABBY GAIL LASSITER,

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v.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

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On Writ of Certiorari to the North Carolina Court of Appeals

BRIEF FOR THE STATE OF NORTH CAROLINA, *AMICUS CURIAE*, JOINED BY THE ATTORNEYS GENERAL OF DELAWARE AND MISSISSIPPI, AND THE STATES OF FLORIDA, NEVADA AND ARKANSAS, *AMICI CURIAE*

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QUESTIONS PRESENTED BY *AMICUS CURIAE*

I. Does the Due Process Clause of the Fourteenth Amendment require that indigent parents be afforded appointed counsel in cases brought by a state or its subdivision seeking to terminate parental rights, and if so, must counsel be appointed for indigent parents in every such case?

II. Should a right to appointed counsel for indigent parents in termination of parental rights actions prosecuted by a state or its subdivision be given retrospective application?

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INTEREST OF AMICUS CURIAE

At issue is the constitutionality of North Carolina's Termination of Parental Rights Law, N.C.G.S. 7A-289.22, *et. seq.* (1979 Cum. Supp.) North Carolina's Attorney General, counsel for *amicus curiae*, is charged by law to defend the constitutionality of State statutes. 28 U.S.C. §2403(b); N.C.G.S. 114-2(1). The Attorney General is satisfied that the termination law is constitutional, notwithstanding that it does not provide for appointment of counsel for indigent parents whose parental rights are challenged, and *amicus* believes the statute is sound. Therefore, *amicus* wishes to join in this case. Further, *amicus* believes that the rejection of its position will have the following harmful effects. First, it will be necessary once again to terminate the parental rights of the Petitioner, Abby Gail Lassiter, which would delay, perhaps for another two years, the prospect of adoption for Petitioner's child, William. Second, an adverse decision will imply that a general right to appointed counsel for indigents exists in all important civil matters. Third, and most

important, an adverse decision might be given retrospective effect thereby upsetting numerous existing terminations and adoptions.

SUMMARY OF THE ARGUMENT

As a matter of Due Process under the Fourteenth Amendment, the right to appointed counsel for indigents only exists in cases where the indigent's personal physical freedom—his "absolute liberty"—is at issue. Thus, there is a right to appointed counsel in criminal cases, juvenile delinquency cases, and, often, involuntary commitment cases for the mentally ill, but not in other cases.

The important right to family integrity is meaningfully less important than the right to absolute personal liberty. Further, while the core of the parent-child relationship is a bundle of privacy rights, such as, for example, the right to instill one's own religious faith in one's child, other aspects of the parent-child relationship are traditionally and undeniably public concerns. Parents have duties to children, among them the duties to provide for their health and well-being, the proper performance of which is as necessary to "ordered liberty" in a democracy as are the private rights referred to above.

The parents' interest in family integrity is balanced by the State's compelling interest in protecting children. Moreover, the child has interests in his safety and in a correct and speedy determination of a termination of parental rights case, and these interests weigh on the side of the State, because the State is committed by law and tradition to act in what it believes to be the best interest of the child. While the State may be mistaken in a particular case, it is very unlikely that the State will proceed against a parent in bad faith. However, the same cannot be said of parents, who have both reasons and the ability to resist the termination action for unworthy motives.

North Carolina law provides safeguards to ensure accurate fact-finding at termination of parental rights hearings. Counties can only bring termination actions on certain narrow grounds. N.C.G.S. 7A-289.32 (1979 Cum. Supp).

Counties do not institute termination proceedings (except in cases of neglect by abandonment) without first attempting to solve the family problem which might constitute grounds for termination. The grounds for termination are not too complicated for parents to understand, and even parents who would have difficulty understanding the meaning of the various grounds can reach that understanding during the time the county department of social services works with them to solve their problems. Furthermore, the issues in termination cases are largely problems in social work practice, and, as such, they may be entrusted to a significant degree to professional social workers. Under these circumstances, appointed counsel do not meaningfully improve the fact-finding process.

With respect to the termination proceedings themselves, the State enhances due process by requiring that findings of fact be made on the basis of clear, cogent and convincing evidence[1] and by providing a guardian *ad litem* for the child in cases where the parent answers.

Given the balance of State and private interests and the significant steps taken to protect the fact-finding process, any burden on the State which follows from the appointment of counsel for indigent parents is constitutionally significant. Since the cost of parents' counsel will be real and the parents' attorney may be a source of delay, appointed counsel for parents are not required.

If this Court requires appointed counsel in termination of parental rights cases, the Court must hold that the need for counsel should be determined on a case-by-case basis. If the Court holds that indigent parents are entitled to appointed counsel in termination cases, *amicus* respectfully urges the Court that the decision should be narrowly drawn, so as not to imply a right to counsel in other important areas of civil law.

Equally important is the need for exclusively prospective application of any new rule. No child who has been freed for adoption, and certainly no child who has been adopted,

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[1]This quantum of proof was adopted in 1979 subsequent to the trial of the present case. N.C.G.S. 7A-289.30(e) (1979 Cum. Supp.).

should be forced to face the fear which would accompany any attempt to overturn an existing termination for the reason that the indigent parent involved was not represented by court appointed counsel.

ARGUMENT

1. AN INDIGENT'S CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL, ARISING UNDER THE DUE PROCESS CLAUSE, IS LIMITED TO CASES OF PERSONAL FREEDOM; THEREFORE, THE RIGHT DOES NOT PERTAIN TO CIVIL ACTIONS BROUGHT TO TERMINATE PARENTAL RIGHTS.

Due process joins order to liberty, and the two are symbiotically intertwined. The present case arises out of a very important aspect of liberty, the parent-child relationship. It lies on the cusp between the private aspects of the family relationship, which are so important to liberty, and the public aspect, which must be watched and protected in the interest of order, generally, and the child's welfare, in particular.

It is too simple to say that the parent-child relationship is fundamental to "ordered liberty" and, therefore, must be protected by appointed counsel. What is fundamental is that the child must have a safe home where he or she is cared for, adequately educated and inculated with the necessary values and principles underlying our society. While it is recognized that the family is almost always best able to pass down our "most cherished values, moral and cultural", *Moore v. City of East Cleveland, Ohio,* 431 U.S. 494, 504 (1977), it is the end, not the means, which is fundamental to ordered liberty. When—albeit rarely—a family cannot or will not rear its children according to minimum civilized standards, the State is compelled to rescue the child.

Only a part of the parent's liberty is involved in a termination of parental rights action. Thus, a termination case differs from other decisions in this Court which recognize a right to appointed counsel where absolute personal freedom is involved. Further, when parental conduct moves away from the private core of the parent-child relationship and begins to touch the State's duty to protect the child, such conduct deserves somewhat less constitutional protection than conduct which is wholly private. Traditionally public aspects of the parent-child relationship may be touched by the State for reasons and in ways which could not constitutionally justify State interference in the private core of family life. After all, "due process is flexible and calls for such procedural protection as the particular situation demands." *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972).

A. Personal Freedom Underlies All Civil or Criminal Cases Which Recognize a Due Process Right to Appointed Counsel.

The right to appointed counsel for indigent defendants began as a constitutional rule of criminal law, *Powell v. Alabama,* 287 U.S. 45 (1932), and it has never pulled loose from its moorings. Nor should it, for criminal punishment involves both an infringement of personal liberty and a stigma which are above all others. Further, criminal process—if abused—quickly and deeply undermines democratic freedom. It is, therefore, easy to understand why the right to be represented by counsel at a criminal trial is among the fundamental rights expressly recognized in the Sixth Amendment, while the common law right to retain counsel in civil matters is not similarly affirmed.

There can be no doubt that the special nature of criminal prosecutions is the principal reason for appointed counsel in criminal cases.[2] In *Powell v. Alabama, supra,* the Court held

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[2]Criminal trials are unique. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color." *Griffin v. Illinois,* 351 U.S. 12, 17 (1956) (Fourteenth Amendment requires free transcripts for appellate review of criminal convictions).

that the right to appointed counsel in an unusual capital case was among the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 287 U.S. at 67. Four years later, in *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), the "fundamental right of the accused to the aid of counsel in criminal prosecutions" was reiterated. When the right to appointed counsel was extended to the states, Mr. Justice Black wrote:

> The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.
>
> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

More recently, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), held that no person may be imprisoned for any offense without having been represented by counsel at trial. Viewing *Powell* and *Gideon* in retrospect, this Court summed them up, saying as follows:

> [T]heir rationale has relevance to *any criminal trial* where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that *there are certain fundamental rights applicable to all. . . criminal prosecutions, even those. . . where the penalty is 60 days imprisonment.*
>
> *Id.* at 32 (emphasis added).

Plainly, in light of *Argersinger*, imprisonment for a crime is the cornerstone supporting the right to appointed counsel. *Accord, Scott v. Illinois*, 440 U.S. 367 (1979).

Moving away from criminal prosecutions, the right to appointed counsel becomes less absolute. At parole and probation revocations, the right to counsel is not absolute even though the revocation would deprive the defendant of his personal freedom. This Court reasoned that the defendant had already lost his "absolute liberty" by virtue of

his conviction and that what remained was "conditional liberty." *Gagnon v. Scarpelli,* 411 U.S. 778, 781 (1973); *Morrissey v. Brewer,* 408 U.S. 471, 480 (1972). Because something less than the defendant's entire "bundle" of liberties was at risk, an absolute right to appointed counsel did not exist.

The analysis of appointed counsel in the civil context is even more complicated.

> Civil lawsuits. . . are not like government prosecutions for crime.... [T]he government is not usually involved as a party,[3] and there is no deprivation of life, liberty or property as punishment for crime. Our Federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict due process rules the Constitution has provided to protect people charged with crime.
>
> *Boddie v. Connecticut,*
> 401 U.S. 371, 391 (1971)
> (Black, J., dissenting).

Because of this constitutional difference between criminal and civil cases, the right to appointed counsel has only been extended to civil cases insofar as they resemble criminal cases and carry both a real threat of incarceration and, in lieu of punishment, a meaningful stigma.

In *In re Gault,* 387 U.S. 1 (1967), this Court held that a juvenile respondent had a right to appointed counsel at a delinquency hearing where he was threatened with the prospect of commitment to training school. *Id.* at 554. Time

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[3]In the present case, the Durham County government is plainly a party, but only as a friend of the child, who would have no protection without the county's assistance. The county is like the other private persons who have standing to bring petitions to terminate parental rights. See, N.C.G.S. 7A-289.24 (1979 Cum. Supp.).

and again in *Gault*, this Court emphasized the similarity between delinquency proceedings and criminal trials, between juvenile commitment and adult incarceration. *Id.* at 533, 538, 546, 547, & 551. Plainly, the close similarity between criminal court and juvenile court was necessary to the conclusion that counsel must be appointed.

Involuntary commitment of the mentally ill also involves deprivation of absolute liberty and stigma[4] in lieu of punishment.[5] Therefore, for many purposes these hearings partake of the nature of criminal trials.[6] Analysis is complicated somewhat by the fact that the leading cases[7] involve the mental health treatment of criminal prisoners, but for the purpose of this brief, *amicus* may say without harm to its argument that a right to appointed counsel probably attaches to involuntary commitment hearings,[8] because it is plain from the cases in this Court that the right is incident to a massive loss of personal liberty. *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (plurality opinion) ("mandatory behavior modification"); *Specht v. Patterson*, 386 U.S. 605, 607 (1967) (sex offender found to be mentally ill "becomes punishable for an indeterminate term").

Except in the cases above, there is no right to appointed counsel for indigents. It is not even always available in the criminal context. *Gagnon v. Scarpelli, supra,* (counsel at parole or probation revocation depends on case-by-case analysis). The prospect of summary criminal punishment in cases of direct criminal contempt does not require

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[4]*Vitak v. Jones*, 445 U.S. 480, 494 (1980).

[5]The prospect of punishment is not altogether absent. If one committed for mental health treatment receives none, the hospital may be transformed into a penitentiary. *Rouse* v. *Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966).

[6]However, proof beyond a reasonable doubt is not necessary to an involuntary commitment. *Addington* v. *Texas*, 441 U.S. 418, 431 (1979). And a juvenile may be placed in a mental hospital with limited procedural formality, provided his parents concur. *Parham v. J.R.*, 442 U.S. 84, 606-613 (1979).

[7]*Vitek* v. *Jones, supra*, n.4; *Jackson* v. *Indiana*, 406 U.S. 715 (1972); *Specht* v. *Patterson*, 386 U.S. 605 (1967).

[8]*Heryford* v. *Parker*, 396 F.2d 393, (10th Cir. 1968) (likelihood of involuntary loss of liberty is "of utmost importance").

appointment of counsel. *See, Brown v. United States,* 359 U.S. 41, 51 (1959). While there is a split of authority, the prospect of incarceration for civil contempt is more often held not to require appointment of counsel for the alleged contemnor, except in complicated cases. *Jolly v. Wright,* 300 N.C. 83, 94, 265 S.E.2d 135 (1980); *Sword v. Sword,* 399 Mich. 367, 381, 249 N.W.2d 88 (1976); *Duval v. Duval,* 114 N.H. 422, 425-26, 322 A.2d 1 (1974). *Contra, Tetro v. Tetro,* 86 Wash.2d 252, 255, 544 P.2d. 17 (1975) (incarceration *sine qua non*); *Otton v. Zaborac,* 525 P.2d 537 (Alaska 1974) (incarceration *sine qua non*). Claims of a right to appointed counsel have been rejected by courts in the domestic context, *Kiddie* v. *Kiddie,* 563 P.2d 139, 143, 85 A.L.R. 3d 977 (Okla. 1977); *In re Smiley,* 36 N.Y.2d 433, 433, 369 N.Y.S.2d 87, 330 N.E.2d 53 (1975); *Parsley v. Knuckles,* 346 S.W.2d 1,3 (Ky. 1961) (dicta), and in other civil contexts. *United States v. Cohen,* 530 F.2d 43, 48 (5th Cir. 1976) (psychiatric exam ordered by court); *United States v. Sturgis,* 342 F.2d 328, 332 (3rd Cir. 1965) (draft board hearing).

Finally, this Court previously faced the present question in *Kaufman* v. *Carter,* 402 U.S. 954 (1971) (op. of Black, J., diss. from den. of cert.). The Court, of course, denied certiorari, thereby allowing to stand a California decision[9] denying appointed counsel, which was decided on the express ground that a termination case was a civil case to which no right to counsel attached. In dissent, Mr. Justice Black took the position that termination cases were substantially like criminal cases. *Amicus* respectfully disagrees with Justice Black's opinion, but *amicus* accepts his mode of analysis. It is, in fact, the difference between criminal trials and termination proceedings which eliminates the constitutional need for appointed counsel at the latter.

B. The Right to Family Integrity, Which Is Part of a Larger Right to Privacy, Is Important, But It Is Meaningfully Less Important Than Personal Freedom.

The preceding section demonstrates that the right to

[9] *Robinson* v. *California,* 8 C.A.3d 783, 87 Cal. Rptr. 678 (1970). *See, In re Cager,* 251 Md. 473, 485, 243 A.2d 384 (1967) (no right to counsel in neglect/custody case).

appointed counsel depends not merely upon a deprivation of some liberty or upon punishment, but rather upon the loss of absolute personal freedom. Petitioner seeks to raise herself to the level of these cases by establishing the constitutionally "fundamental" nature of her right to custody of William. In so doing, she relies on several decisions of this Court, which, in the opinion of *amicus*, are distinguishable in that they do not involve parents and children,[10] lie at the private core of the parent-child relationship,[11] or involve First Amendment rights in addition to the right to custody of children.[12] Those cases which are most closely on point stop short of saying all aspects of the parent-child relationship are "fundamental"[13] and indicate that the strength of a parent's right may vary according to parental conduct.[14]

The best statement of the right to family integrity appears in *Stanley v. Illinois*, 405 U.S. 645 (1972). The case holds that the natural father of illegitimate children, whom he had raised, was entitled to notice and an opportunity to be heard before the children could be made wards of the State. This Court condemned Illinois' "procedure by preseumption," *id.* at 656-657, which denied Stanley any procedural rights because his children were illegimate.[15]

In *Stanley*, this Court "emphasized the importance of the family." *Id.* at 651. In so saying, the Court relied on a number of substantive due process cases involving either mixed questions of family relationships and First Amendment rights or matters of sexual privacy. While certain of these

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[10]*Smith v. Organization of Foster Families*, 431 U.S. 817 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also, cases cited in *Stanley v. Illinois*, 405 U.S. 645, 561 (1972).

[11]*Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[12]*Yoder v. Wisconsin, supra; Pierce v. Society of Sisters, supra.*

[13]*Stanley v. Illinois, supra*, n. 11, at 651 (1972).

[14]*Caban v. Mohammed*, 441 U.S. 389, 392 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

[15]*Stanley* is similar to *Boddie v. Connecticut*, 401 U.S. 371 (1971) in that the Illinois presumption of unfitness entirely foreclosed Stanley's opportunity to get into court to litigate custody of his children.

underlying cases speak of the "fundamental" nature of the family, which cannot be infringed except for compelling reasons, *Stanley* stops short of this in applying procedural due process to a question of parental fitness and child custody. *Stanley* says that the "private interest" of a man in the children he has sired *and raised* warrants deference and protection "absent a powerful countervailing interest." *Id.* at 651. *Accord, Quillion v. Walcott*, 434 U.S. 246, 248 (1978). However, *Stanley* also recognizes that "neglectful parents may be separated from their children," *id.* at 652, because the State has a powerful interest in doing so. *Stanley* only demands that neglectful parents be given notice and a fair hearing. In short, though *Stanley* says a great deal, it says somewhat less than Petitioner supposes. After its discussion of the importance of familial rights, *Stanley* only imposes the ordinary standard of procedural due process.

Following *Stanley*, this Court held in *Quilloin* v. *Walcott*, *supra*, that a father of illigitimate children who had not raised or legitimated his children could lose his children through adoption without his consent upon a showing that this was in their best interest and without a showing that he was unfit. *Id.* at 255. *Quillion* means that substantive family rights depend, in part, on parental conduct.[16] Not only are a parent's rights in his children less than fundamental when the parent's harmful conduct is a traditionally fit subject of public scruntiny, but they can atrophy.[17]

The foregoing cases mean that the parent-child relationship—important as it is—is not so fundamental that it naturally requires the extraordinary due process protection of court-appointed counsel in order to be fundamentally fair. Therefore, those lower court decisions in termination or neglect proceedings which hold, without more subtle analysis, that counsel must be appointed to protect the

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[16]"Parental rights do not spring full blown from the biological connection between parents and children. They require relationships more enduring." *Caban v. Mohammed, supra*, n.14, at 397 (Stewart, J. dissenting).

[17]*Compare, Smith v. Organization of Foster Families*, 431 U.S. 816 (1977), which holds that foster parents can, over time, acquire an interest in their foster children which deserves rudimentary due process protection.

parents' fundamental interest in their children are mistaken.[18]

C. The Balance of Relevant Factors Indicates that the State Need Not Appoint Counsel for Indigent Parents In Termination of Parental Rights Cases.

The triparte test for calculating the amount or quality of procedural process which is due appears in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The *Mathews* test shows that the State is not obligated to provide appointed counsel to indigent parents in termination of parental rights cases.

[18] *Smith v. Edmisten*, 431 F.Supp. 941 (W.D. Tenn. 1977); *State ex rel Heller v. Miller*, 61 Ohio St.2d 6, 399 N.E.2d 66, 67 (1980); *In re Brehm*, 3 Kan.App.2d 325, 594 P.2d 269 (1979); *Matter of Chad S.*, 580 P.2d 983, 985 (Okla. 1978) (dicta); *Reist v. Bay County Circuit Judge*, 396 Mich. 326, 241 N.W.2d 55 (1976); *In re Myricks*, 85 Wash.2d 252, 533 P.2d 341 (1975); *Crist v. Division of Youth and Family Services*, 128 N.J.Super. 402, 320 A.2d 203, 210 (1974); *In re Welfare of Luscier*, 89 Wash.2d 135, 524 P.2d 906 (1974); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *In re Ella B.*, 30 NY.2d 352, 285 N.E.2d 288 (1972); *State v. Jamison*, 241 Or.144, 444 P.2d 15 (1968)(dicta)

Other cases relied upon by Petitioner are distinguishable because they rely on an underlying statute. *Matter of Chad S., supra; In re Simeth*, 40 Cal.App.3d 982, 115 Cal Rptr. 617 (1974); *Chambers v. District Court*, 261 Iowa 31, 152 N.W. 2d 816 (1967) (dicta). Others involve child neglect custody cases where, as is explained *infra* at 16, n. 40, the relationships between parties are more complex and separate counsel for all parties are more important. *Davis v. Page*, 618 F.2d 374 (5th Cir. 1980); *Smith v. Edmisten, supra*. Others involve continued representation on appeal. *In re Brehm, supra; Reist v. Bay County Circuit Judge, supra.*

1. The Private Interests Affected.

Amicus has already weighed the parent's interest in family integrity. That interest is less weighty than personal freedom, and it is not fundamental when questions of public concern, such as minimally adequate care, are involved. Therefore, that interest alone does not compel the State to appoint counsel for indigent parents.

Applying the *Mathews* analysis to this case, the child's interest must be included in the calculation with the parent or against him, as is appropriate. Ordinarily, the child's interest coincides with his parents'. *See, Parham v. J.R.*, 442 U.S. 584 (1979). But, termination cases are not ordinary, and, as these cases involve the child's privacy, the State and the child may combine their interests against those of the parents. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

In general terms, grounds for termination at the time in question were parental failure to establish or maintain concern or responsibility for the child, abuse, neglect, illegitimacy coupled with gross paternal disinterest, nonsupport for six months while the child is in institutional custody, or failure for two years to make "substantial progress" or a "positive response" toward correcting the conditions that led to placing the child in foster care.[19] Termination cases normally cannot be brought until the child has been in county custody and care for at least six months.[20] Thus, termination cases cannot be brought except where there is well established reason to believe that grounds exists and that the child's best interests are served. This being so,

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[19]N.C.G.S. 7A-289.32. (1977 Cum.Supp.)

[20]While abuse, neglect or lack of parental concern or responsibility can constitute immediate grounds for termination, in practice misconduct serious enough to justify termination triggers a child custody action under the separate procedures of N.C.G.S. 7A-516, *et seq.* (1979 Cum.Supp)[former N.C.G.S. 7A-277, *et seq.* (1977 Cum.Supp.)] Once the child is in custody, social services proceeds deliberately, first to restore the family, and only if this is impossible, to develop a sound case for termination.

the child's own privacy interests weigh with the State, and less process is due to the parent.

2. The Risk of Error and Usefulness of Appointed Counsel.

Lawyers are ill-suited to argue against their own usefulness in any judicial proceeding. At the same time usefulness obviously has not been the test for appointment of counsel; had it been, attorneys would be appointed in all matters. They are not, because the courts have indicated that the nature of the forum,[21] importance of the interest involved,[22] and presence of alternative safeguards,[23] are also important parts of the procedural due process calculation.

Looking at termination proceedings, we see that, while they are judicial and not informal, they are also based on fairly simple grounds. Almost always, the case involves a child who has been in social services custody for some time and parents who have been receiving social services. The parents have had the opportunity to learn over time what acts, omissions or conditions must be changed before the county department can safely return their children. In practice, then, social workers give meaning to the statutory grounds for termination of parental rights, and parents have reason to understand what is in issue.[24]

Petitioner's case illustrates this. Her parental rights were terminated because she wilfully left her child in foster care for two years without showing a positive response to Social Services efforts to strengthen her relationship with William or to plan for his future.[25] Joint Appendix at 7. It is clear from the transcript and the Joint Appendix that Petitioner knew, or should have known, why her parental rights were in

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[21]*Goldberg v. Kelly*, 397 U.S. 254 (1970); *Parham v. J.R., supra.*

[22]*Goldberg v. Kelly, supra; Argersinger v. Hamlin, supra; Gagnon v. Scarpelli, supra.*

[23]*Parham v. J.R., supra; Gagnon v. Scarpelli, supra*

[24]When we are dealing with due process rights other than in criminal trial context, it is a "sufficient answer" to the objection that a "hidden" defense may be lost for want of a lawyer to say that it is *not* a criminal case. *Gagnon v. Scarpelli*, 411 U.S. at 789.

[25]The ground relied upon is found at N.C.G.S. 7A-289.32(3) (1979 Cum.Supp.) Petitioner has *never* challenged this conclusion.

jeopardy. She had left her then eight-month old child, William, malnourished, infected, and untreated by doctors.[26] Her own mother filed a neglect complaint against petitioner[27] and several times told county social workers she could not raise William[28]. After Petitioner's son entered foster care, she saw him once at the behest of social services[29] and twice more by chance meeting on the street.[30] She never took any interest in him while he had been in foster care,[31] and although she was contacted in prison by social services, she never initiated any contact with the department.[32]

Significantly, Petitioner understood the purpose of the hearing[33] and attempted to rebut this evidence. She denied medically neglecting her son, and said she carried him to the doctors for treatment.[34] She and her mother denied that her mother filed the neglect petition.[35] She testified that her efforts to see her son were thwarted by social services' inattention.[36] She cross-examined the social services' witness concerning the witness' opinion that termination was in the child's best interest,[37] and she offered her countervailing theory that children naturally know and belong with their family.[38] In short, Petitioner presented the evidence she needed, either on her own or in response to pertinent questions by Respondent's counsel, but was not believed.

Her present objection that the case against her was proved, in part, by unauthenticated business records[39] forgets that the judge was able to discount the hearsay if he found it less credible than the live testimony, and assumes that the

[26]Transcript at 11.
[27]Transcript at 17.
[28]Transcript at 14.
[29]Transcript at 12; Joint Appendix at 6.
[30]Transcript at 12; Joint Appendix at 6.
[31]Transcript at 22.
[32]Transcript at 15-16; Joint Appendix at 6-7.
[33]Transcript at 20.
[34]Transcript at 25.
[35]Transcript at 30, 48 & 49.
[36]Transcript at 38 & 52.
[37]Transcript at 20 & 22.
[38]Transcript at 40.
[39]The hearsay is, of course, competent, since there was no objection.

evidence could not have been authenticated and admitted over objection. She also ignores the significant evidence adduced from the orders in the earlier neglect hearing.[40] Finally, the trial judge showed no bias against the Petitioner;[41] the court's concern with precise questions was meant to keep the Petitioner on track[42] not to lead or impeach her.

This Court has recognized that fact-finding in special cases can be fairly protected by means other than full-blown judicial process. *Parham v. J.R., supra.* North Carolina provides such safeguards in termination cases. Foremost is good social work practice. North Carolina law prevents termination except when the "parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.[43] North Carolina leads the trend in social work

[40]*Amicus* wants the Court to be aware of the fact that since this case was tried, North Carolina has added a provision to its Juvenile Code, N.C.G.S. 7A-516, *et seq.*, (1979 Cum.Supp.) which provides appointed counsel for all parents in abuse, neglect and dependency cases. N.C.G.S. 7A-587. Thus, parents are represented at the threshold litigation concerning child custody. See, N.C.G.S. 7A-289.32(2), (3) & (4) (1979 Cum.Supp.).

Petitioner cites this change in law as ironic, but *amicus* urges the Court to recognize that counsel for both parents and child [N.C.G.S. 7A-586] is more important during abuse or neglect cases where, under the present system, the county department of social services has statutory obligations both to the child and the parent. N.C.G.S. 7A-516(3) & N.C.G.S. 7A-646 (1979 Cum.Supp.) When the county's interests are divided, both parent and child deserve independent protection. In termination cases, however, the county's attentions are not divided. It stands as a friend of the child, and the parent stands apart.

[41]The judge summed up his role, saying, "I want to give you a fair try (sic)." Transcript at 24.

[42]See, Transcript at 52.

[43]N.C.G.S. 7A-289.22(1)(1979 Cum. Supp.). State policy is in accord. "When the relationships essential to the child's well-being and self-worth are threatened or destroyed, first and continuing efforts should be directed toward increasing or restoring family unity. When such efforts fail and removal of a child from his family becomes mandatory, careful attention should be paid to selecting the type of care away from his family. . . In order to permit a child's early return to his family, it is necessary to try to increase the strengths of his family. Permanent separation of a child from his family should be determined as quickly and soundly as possible." I *Family Services Manual*, c. IV, 1200 (Rev. 75).

practice toward *very selective* but *prompt* use of termination as a means of providing children with good permanent homes.[44]

Turning to other precedural protections, North Carolina takes a most important step toward protecting the child's interest in all cases wherein the parent files an answer by appointing an attorney as guardian *ad litem* to represent the child. N.C.G.S. 7A-289.29(b) (1979 Cum. Supp.). If an independent, legally-trained participant is needed (in

[44]In a one-year pilot program involving eight counties, each county assigned a reduced case load of 16 children to selected social workers. A total of 370 children were involved, and 238 children returned home. Another 59 were adopted. The remaining 73 were in long-term foster care, pre-adoptive placement or likely soon to go home. The money savings prompted four of the eight counties to hire additional social workers to expand the program, and other counties are following suit. *North Carolina Department of Human Resources, Division of Social Services. Permanent Homes for North Carolina's Children: A Report on Permanency Planning in an Eight County Project* (1980).

The North Carolina Department of Human Resources, Division of Social Services, maintains unpublished records showing the means by which adopted children were made legally free for adoption:

YEAR	All Final Public Agency Adoptions	Public Agency Adoptions Based on Termination
1977	431	102
1978	479	125
1979	398	188

These same records show the elapsed time between termination and adoption:

	Time in Months Between Termination and Adoption			
YEAR	0-6	7-12	13-18	19 & Over
1977	60	11	3	28
1978	65	23	10	27
1979	119	26	9	34

(The number of terminations shown here is lower than the number of terminations shown at p. 18 because (1) these figures do not include 1980, (2) these figures only show final adoption orders which usually are not entered for one year after the adoption proceeding is begun, and (3) not all terminations result in adoptions.)

addition to the judge) the guardian *ad litem* serves that end.

The Court must recognize the special ethical obligations of government attorneys to seek justice, avoid unfair litigation and treat all ligitants so as to avoid harm.[45] Here, frankly reality reinforces ethics, because in local government legal practice small staffs and high case loads combine to preclude unmerited litigation.

Finally, *amicus* asks the Court to note that termination hearings are recorded in every instance, N.C.G.S. 7A-289.30(a) (1979 Cum. Supp.), and this is an important safeguard against error or caprice. The State also asks the Court to note that, subsequent to the trial of the present case, North Carolina raised the quantum of proof in termination actions to clear, cogent and convincing evidence. N.C.G.S. 7A-289.30(e) (1979 Cum. Supp.)

In light of these procedures and because appointed counsel for parents would not bring any special knowledge of social work, psychology or family therapy to a termination proceeding, *amicus* insists that appointed counsel would not be a significant addition to the factfinding process.

Practice in North Carolina seems to bear this out. A survey of North Carolina county departments of social services conducted in preparation for this argument[46] indicates that terminations cases are (1) always warranted and (2) not significantly affected by the presence of counsel for the parents. Of the 100 countries, 73 responded, including the eight largest.

In the responding counties, 768 termination of parental rights cases were brought between October, 1977 and December, 1980. Parental rights were terminated 760 times and not terminated eight times. In 127 of the cases, parents were represented by counsel. Of these 127, parental rights were terminated 120 times and not terminated seven times. One parent successfully defended his parental rights himself.

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[45]Code of Professional Responsibility of the North Carolina State Bar, Ethical Consideration EC7-9, EC7-10, EC7-11, EC7-13, EC7-14.

[46]Survey data appears in Appendix C. of Respondent's Brief. *Amicus* is aware of the potential weaknesses in research of this sort, and offers it only in the absence of any published or regularly compiled data.

Looking at the seven cases where parents with counsel prevailed, in five of them the court concluded that grounds for termination existed but that termination would not be in the child's best interest.

In evaluating these figures it is good to remember that the large majority of these cases were uncontested by the parents. Although the exact figures are not known, it is likely that the number of contested cases where parents were without counsel does not much exceed the number of cases where parents retained counsel.

Amicus finds the following implications in these figures. First, social workers do not bring unfounded petitions to terminate parental rights. Only .3% of the cases were without grounds. This indicates that extra-judicial safeguards in North Carolina work. Second, the presence of counsel does not significantly affect the outcome, and insofar as it does, the presence of counsel correlates with a finding that termination, though authorized, is not in the child's interest. This correlation might be the result of a bias in favor of affluent parents, who can afford counsel, or a bias in favor of interested parents, who will take the added step of retaining counsel. It is not necessarily a testament to the effectiveness of counsel.

3. The Burdens on State Function and Resources.

The third part of the *Mathews* analysis requires a calculation of the effect on the State. Given that the State is cloaked with the child's interest and that the fact-finding process is inherently accurate, any burden on the State tips the scales decisively in its favor.

As *amicus* understands this third part of the *Mathews* test, the effect on State function is something different than the effect on the State's resources. The State's exclusive function in termination cases is the protection of the child. This is not a quasi-criminal proceeding to vindicate society's rights. This is a pure *parens patriae* proceeding wherein the State is protecting the physical well-being of a child.[47] In fulfilling

[47]See, *In re Gault*, 387 U.S. at 16.

this role, the State is not very different from private child-placing agencies, parents and foster parents who may also file termination cases. But if the State must provide appointed counsel, then its function is subtly changed. The State is made to appear to be acting in a quasi-criminal fashion, acting to punish not to protect.

The State's function will be affected in a second way if it must appoint counsel in these plainly civil cases, which do not involve personal freedom. The State is involved in much civil litigation against persons, who may be indigent, involving important liberty and property interests.[48] If the existing threshold between those cases which involve absolute liberty and those which do not is crossed, then, as Mr. Justice Douglas said in a related context. "I do not see the length of the road we must follow."[49] Given the (properly) inexorable progress of the appointed counsel rule in criminal cases, the State's traditional position as an ordinary civil litigant will be deeply undermined if Petitioner prevails here. No matter how this Court emphasizes the special importance of the parent's liberty interest, the challenge will begin.[50]

Turning to the probable burden on State resources, the State's cost of supplying attorneys for indigent parents in termination cases alone will be significant. In North Carolina, judges set the fees for court appointed counsel, and, of course, there is no precedent by which we can judge the cost to the State. But given approximately 250 terminations a year,

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[48]Among these are actions in tort, to collect debts, to condemn property, to foreclose tax liens, to revoke licenses, and others. Plainly, these can affect a person's home or means of livelihood. Some involve the possibility of criminal liability. Their importance should not be gainsaid.

[49]*Boddie* v. *Connecticut*, U.S. at 385 (Douglas, J. concurring). *See, also, State ex rel. Heller* v. *Miller, supra at* 15 (Holmes, J. dissenting) ("Where will the right to appointed counsel. . . at state expense end?").

[50]The challenge has begun. In the wake of *Boddie* v. *Connecticut, supra*, two courts have faced the question of appointed counsel in domestic cases. *Kiddie v. Kiddie, supra; In re Smiley, supra.*

At this time in North Carolina, a case is pending which asks the State to appoint counsel for respondents in paternity/child support actions. *Wake County ex rel. Carrington v. Townes*, No. 8010 DC 1024 (North Carolina Court of Appeals, filed Oct. 24, 1980).

fees of only a few hundred dollars per case would total over $100,000. This is not *de minimus,* and there must be added to it the additional administrative costs.

D. Appointed Counsel Would Not be Needed in Every Termination of Parental Rights Case.

In response to the suggestion that appointed counsel are always needed at parole and probation revocations, this Court said:

> While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or likelihood in a particular case for a constructive contribution by counsel.
>
> *Gagnon v. Scarpelli,*
> 411 U.S. at 787

Gangnon analyzed at least seven factors in weighing the need for counsel: the purpose of the proceeding, its form and formality, the interests served, the safeguards present, the cost to the State, the existence of a "timely and colorable" defense, and the fundamental fairness of the procedures. We consider these factors *seriatim.*

First, as discussed above, termination actions are meant to protect children, not punish parents. They arise after efforts to restore the family have failed and, in this respect, are analogous to *Gagnon,* where it is said that parole revocation is a failure of rehabilitative efforts. *Id.* at 785. This Court concluded in *Gagnon* that parole officers have professional reasons to avoid unmerited revocations, and the same is true of terminations, as is evinced by the North Carolina statistics explained above.

Second, while termination actions are more formal than parole revocations, it should be remembered that they usually arise, as this one did, after the children have been removed from the home, and parents have had the opportunity to learn what is the matter. The procedure in

termination cases does not include the technicalities which are present in criminal law, such as, for example, sufficiency of a warrant, questions of double jeopardy, or motions to suppress evidence. This reduces the need for counsel. *See, id.* at 789. While it is true that an unrepresented parent will not know the rules of evidence, he is singularly able to speak to the facts which allegedly constitute grounds for termination, and he does not have the added problem of speaking to a jury. Nor is the hearing entirely formal. The judge has considerable discretion at the disposition stage, N.C.G.S. 7A-289.31 (1979 Cum. Supp.), in determining whether the termination would be in the child's best interests, irrespective of the fact that grounds exist. It is significant that the data shows that parents (even represented by counsel) are more likely to prevail on this discretionary ground than they are to rebut the county's formal proof that grounds for termination do exist.

The third, forth and fifth factors are analyzed above, and need not be repeated. The question of a timely and colorable defense is, however, a new matter. As to timeliness, it should be noted as evidence of a need for a timeliness requirement, that Petitioner utterly failed to answer the termination petition filed against her. Her presence at the hearing was entirely due to counsel for the Respondent. If this factor is to be given weight, it would seem that, at a minimum, no right to counsel attaches to a parent who neither answers nor voluntarily appears at the hearing.

As to a colorable defense, Petitioner had one, her claim that social services was not helpful. However, in many circumstances, it is hard to conceive of a reasonable defense or extenuating circumstances. Thus, if a child is neglected because abandoned, N.C.G.S. 7A-289.32(2) (1979 Cum.Supp); N.C.G.S. 7A-517(21) (1979 Cum.Supp.), it is hard to imagine a colorable defense. The same is true of an illegitimate child who, though known to his father, has never been legitimated or supported, N.C.G.S. 7A-289.32(6) (1979 Cum. Supp.), and of children left in foster care without being given reasonable support. N.C.G.S. 7A-289.32(4) (1979 Cum. Supp.). Finally, the Court must be aware of the fact that very many terminations are uncontested.

As *Gagnon* recognizes, the final test of due process is "fundamental fairness." *Id.* at 790. Given the balance of interests among the child, its parents and the State, given that termination is not desired except where rehabilitative efforts have failed, and given the real financial and administrative costs to the State, it is not unfair at all to require that a parent answer the petition as a prerequisite to appointed counsel. It is not unfair to demand that the parent suggest a substantial defense to the action, something more than Petitioner's mistaken claim that children naturally know and love their families or her frivolous claim that she had seen her son on the street in addition to her only visit at the department of social services. Actually, it is not fundamentally unfair to proceed without appointed counsel at all.

II. A Right To Appointed Counsel For Indigent Parents in Termination Of Parental Rights Cases Must Be Given Wholly Prospective Effect.

Amicus is keenly aware that decisions by this Court involving important personal rights are frequently given retrospective application. Of course, this is not always so. *Eg., Linkletter v. Walker,* 381 U.S. 618 (1965). In its decisions dealing with non-retroactivity, the Court has considered three separate factors.

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precent upon which litigants may have relied [citation omitted], or by deciding an issue of first impression whose resolution was will further or retard its purpose [citation omitted]. Second, it has been stressed that "we must... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its purpose [citation omitted]. Finally, we have weighed the inequity imposed by a retroactive application, for "... there is ample basis in our cases for avoiding 'injustice or hardship'

> by a holding of nonretroactivity." [Citation omitted.]
>
> *Chevron Oil Co.* v. *Huson,*
> 404 U.S. 97, 106-107 (1971)

The third factor, "hardship", alone precludes retrospective application of any decision adverse to Respondent and *amicus,* whether the decision calls for an absolute right to counsel or one to be accorded on a case-by-case basis. Retroactive application would threaten several hundred adoptions in North Carolina, and thousands nationally. In addition it would threaten even more completed terminations where the child is in a pre-adoptive placement or in well-settled long-term foster care. The mere knowledge that a retrospective result was possible would make adopted children and their new parents anxious. Certainly, these people had no reason to suspect that an adoption or termination would be vulnerable to a collateral attack. To the contrary, the adoption statute indicates that final adoptions are nearly impregnable, N.C.G.S. 48-28 (1976), and children, parents and agencies alike will have relied on this. In light of this, retrospective application would contradict the Court's often expressed concern for the realities of child placement and its understanding that a child's real present attachments are worthy of great protection and deference. *Eg., Quilloin* v. *Walcott,* 434 U.S. at 244; *Smith* v. *Organization of Foster Families.* 431 U.S. at 844.

Turning to the other factors, we see that this is plainly a case of first impression and one not clearly foreshadowed by this Court. The contrary is the case, as is seen from the Court's emphasis on physical freedom as the touchstone of a right to appointed counsel, *Scott v. Illinois, supra; In re Gault, supra,* and its criminal, Sixth Amendment orgins, *Gideon v. Wainwright, supra; In re Gault, supra,* coupled with the Court's decision ten years ago not to hear the issue. *Kaufman v. Crater, supra.*

Finally, the history of the old rule, that counsel will not be appointed in civil cases, runs to time out of mind. To change that now, even in this single instance, is to rewrite history. On

the other hand, the purpose of the new rule, accurate fact-finding in a matter of great importance, will not be served because (1) the fact-finding is already inherently accurate and amply protected, and (2) the importance of relitigating a settled case and, just perhaps, returning a child to natural parents is out-weighed by the need not to sunder the child's new family.

This Court has indicated that prospective application is appropriate in similar circumstances. *Eg., Caban* v. *Mohammed,* 441 U.S. at 416 (Steven, J. dissenting); *Griffin v. Illinois,* 351 U.S. at 25 & 26 (Frankfurther, J. dissenting). So, too, have other courts. *Crist v. Department of Youth and Family Services,* 320 A.2d at 211. *Amicus* respectfully suggests that this case is one where, if the Court makes new law, that law should be explicitly prospective.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to affirm the decision of the North Carolina Court of Appeals and thereby reaffirm the traditional and well-reasoned rule denying appointed counsel in civil actions not involving personal freedom.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6423

ABBY GAIL LASSITER,

Petitioner,

vs.

DEPARTMENT OF SOCIAL SERVICES OF DURHAM COUNTY, NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the North Carolina Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF OF NORTH CAROLINA CIVIL LIBERTIES UNION AS AMICUS CURIAE AND BRIEF AMICUS CURIAE

NORTH CAROLINA CIVIL LIBERTIES UNION

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MOTION

It is hereby respectfully moved pursuant to Rules 36 and 42 of the Rules of this Court that the above-named Amicus Curiae be granted leave to file the accompanying brief in support of Petitioner.

Consent to such filing has been requested and obtained from Petitioner and refused by Respondent. Letters granting and refusing consent have been filed with the Clerk of this Court.

The interest of the Amicus Curiae is as follows:

The North Carolina Civil Liberties Union (NCCLU) is an affiliate of the American Civil Liberties Union. Membership in the NCCLU is approximately 2,200; in the American Civil Liberties Union, approximately 225,000. The NCCLU is a private, non-partisan organization engaged exclusively in the defense of the United States Constitution. The NCCLU has an interest in the preservation of the family unit - an entity recognized as fundamental to our society under the Fourteenth Amendment to the United States Constitution - and the right to counsel of indigent parents in termination proceedings in which the fami-

lial unit maybe severed.

In the accompanying brief, the Amicus Curiae will address in more detail than Petitioner and Respondent the following issues: the Respondent's characterization of the State's roles as parens patriae while acting in dependency, neglect and abuse cases, and in loco parentis acting in termination of parental rights cases ignores the reality of the termination proceeding and misapplies Parham v. J.R., ____ U.S. _____, 99 S.Ct. 2493 (1979); the risk of erroneous deprivation of parental rights of unrepresented parents because of the complexity of the termination proceeding and the States recognition of this complexity by providing counsel to all parties except parents at termination and the characterization of the termination proceeding as civil or criminal with respect to the need for counsel. Amicus Curiae will also discuss from a wider perspective than Petitioner or Respondent the need for the appointment of counsel in termination of parental rights proceedings in order to legitimize the State's obli-

ation to protect citizens.

Respectfully submitted,

NORTH CAROLINA CIVIL LIBERTIES UNION

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6423

ABBY GAIL LASSITER,
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vs.

DEPARTMENT OF SOCIAL SERVICES
OF DURHAM COUNTY, NORTH
CAROLINA.
Respondent.

On Writ of Certiorari to the North
Carolina Court of Appeals

BRIEF FOR THE AMICUS CURIAE NORTH CAROLINA CIVIL LIBERTIES UNION

SUMMARY OF THE ARGUMENT

The family unit is of fundamental importance to the order and stability of our society. Because the family is so fundamental, State intrusions into the family are limited by the Equal Protection and Due Process clauses of the Fourteenth Amendment, as well as the right of privacy established by the Ninth

Amendment. See, Stanley v. Illinois, 405 U.S. 645, 651-652 (1952), and cases cited therein.

Parham v. J.R., ___ U.S. ___, 99 S. Ct. 2493 (1979) suggested that the State may act in loco parentis under some circumstances in caring for children in its custody. The Parham analysis is inapposite when applied to the facts of this case because the termination of parental rights creates a total deprivation of most fundamental rights. When the State seeks to intrude upon the right of a family integrity, it may do so only for the public's good in parens patriae.

Appointment of counsel for indigent parents in termination of parental rights will help legitimate the State's actions and engender public confidence in the accuracy and fairness of the decision. Termination cases are complex as to fact and law and beyond the capacities of the average layman to conduct. The importance of legal counsel to a fair proceeding is recognized by the State in the statutory scheme for protecting children up to, but not including, the final stage -- termination of

parental rights. Whether a termination proceeding is denominated as "civil" or "criminal" can not decide this case: this Court has always looked beyond labels to the nature of the interests at stake to determine the parameters of due process. In Re Gault, 387 U.S. 1, 49-50 (1967). The interest of family integrity is worthy of the most extensive due process proceedures, but no procedure will be meaningful without "the guiding hand of counsel". Powell v. Alabama, 287 U.S. 45, 69 (1928).

ARGUMENT

I. TERMINATION OF PARENTAL RIGHTS PROCEEDINGS INVOLVE THE MOST FUNDAMENTAL OF RIGHTS IN OUR SOCIETY - FAMILY INTEGRITY

The issues raised in this petition involve the most fundamental of associations recognized in this society: the family, and the rights of parents to raise a child in the family setting. This case addresses directly the question of what procedural due process a state must provide indigent parents when the State seeks to terminate the relationship of parent and child permanently. This brief will discuss the significance of Parham v. J. R., _____ U.S. _____, 99 S. Ct. 2493 (1979), a case raising analytical concerns as to whether the State acts in parens patriae or in loco parentis when seeking to terminate parental rights, and the public policy implications of a decision by the Court in this case.

The parent-child relationship is of fundamental importance to the order and stability of our society. In Stanley v. Illinois, 405 U.S. 645, 651 (1972), this Court, quoting from a litany of cases emphasizing the importance of the family, characterized the right to conceive

and raise one's children as: "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923); one of the "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and, a right" far more precious...than property rights, May v. Anderson, 345 U.S. 528, 533 (1953). This fundamental and constitutionally protected interest has been repeatedly recognized by this Court, see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, supra; Pierce v. Society of Sisters of The Holy Name, 268 U.S. 510 (1925); and Quilloin v. Walcott, 434 U.S. 246 (1978), and the sources of constitutional protection of family privacy are likewise well established.

> The integrity of the family has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, 262 U.S. 390, 399(1923), the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) Stanley v. Illinois, Supra at 651.

This right of family integrity, although traceable to several constitutional provisions, can be generally described as a part of the right

of privacy existing within the constitution. See Roe v. Wade, 410 U.S. 113 (1973). The right to privacy and the particular protected areas it covers have been described as "fundamental." Zablocki v. Redhail, 434 U.S. 374, 384 (1978). Therefore the interests of petitioner in a continuing parent-child relationship which were completely terminated by the North Carolina proceeding at issue here are fundamental rights under the Constitution.[1]

This Court has consistently followed a three-pronged analysis when faced with the issue of how much process is due a protected private interest under the Fourteenth Amendment.

---

1. The North Carolina courts are virtually alone in failing to accord adequate protections in termination cases to vindicate this fundamental right to family intergrity. All but one of the other courts which have considered the question of appointment of counsel for indigent parents in termination or dependency prodeedings have held that appointment is required. N.C. Gen. Stat. §7A-542 requires appointment of counsel for indigents in neglect and dependency proceedings. See cases cited in Davis v. Page, 618 F.2d 374 at 382, footnote 8 (5th Cir., 1980).

Identification of the specific dictates of due process requires consideration of three distinct factors: first, the private interest that will be effected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

This brief will focus upon the significance of the private interest involved to illuminate why it is fundamental and argue that appointment of counsel for indigents will reduce the risk of erroneous deprivation. Failure to require appointment of counsel impacts not only on the risk of erroneous deprivation of a fundamental interest but raises additional considerations of public policy which could defeat the goal the state seeks in each termination case, "to improve the quality

of its citizens, physically, mentally and morally..." Meyer v. State of Nebraska, 262 U.S. 390, 401 (1923).

II. THE RESPONDENT'S CHARACTERIZATION OF THE STATE'S ROLES AS PARENS PATRIAE WHILE ACTING IN DEPENDENCY, NEGLECT AND ABUSE CASES, AND IN LOCO PARENTIS ACTING IN TERMINATION OF PARENTAL RIGHTS CASES IGNORES THE REALITY OF THE TERMINATION PROCEEDING AND MISAPPLIES PARHAM v. J.R., _____ U.S. _____, 99 S.Ct. 2493 (1979).

Respondent characterizes North Carolina's differing treatment of neglect and dependency cases, N.C. Gen. Stat. §7A-542, and termination of parental rights cases, N.C. Gen. Stat. §7A-289.22 as being based upon "different needs, interests, legislative purposes, parties, and procedures..." Resp. Brief in Opp. at 7. Respondent seeks to base this differing treatment of indigent persons on the conclusion that where neglect and dependency proceedings are brought by the State through the local Department of Social Services, the State is acting in parens patriae but where the State seeks to terminate parental rights, it is acting in loco parentis. Respondent further concludes that this perceived

difference in procedures mandates radically differing concepts as to the level of due process required.

We could not disagree more with Respondent's conclusion. A close review of Parham v. J.R., supra, and the actual circumstances under which a termination of parental rights occurs under N.C. Gen. Stat. §7A-289.22 et seq. will reveal that the State cannot properly claim to be acting in loco parentis when terminating parental rights, that the purported distinction between "civil" and "criminal" actions is without substance in this area, and that the power of the State acting in parens patriae motivated this termination, as it does virtually all other terminations brought in North Carolina.

Parham v. J.R. concerned the conflict between the "broad parental authority over children", Parham v. J.R., ___ U.S. ___, at ___, 99 S. Ct. at 2504, and the substantial liberty interest of the child in not being confined for unnessary medical treatment. Supra at 2503.

Procedural due process was required because the State's involvement with the committment procedure constituted State action. Supra. This Court concluded that procedural due process would be satisfied and the risk of error reduced by a neutral fact finder inquiring as to whether the statutory requirements for committment were met. Supra at 2506.

Special attention was paid to the capacities by which parents, or the State as guardian of a ward, sought the committment. This Court concluded, in summary, that the State could act in loco parentis in committing its ward because of a statutory presumption that the State would act in the child's best interest but that the procedures required to review the ward's need for continuing care might be different from those used to review a child with natural parents because, inter alia, of the risk that a ward of the State might be "lost in the shuffle." Supra, 2512-13.

Respondent adopts this analysis to support its contention that the State's role in a

termination proceeding is that of a parent. This approach ignores the unique facts of Parham and it erroneously assumes that of the Department of Social Services is an ordinary litigant in this proceeding, exercising no more or less power or authority than any other parent.

A review of the background of this case will help illuminate the interests involved. Respondent filed a petition to terminate Ms. Lassiter's parental rights. Resp. Brief in Opp. 1. The child had been in the custody of DSS since May 1975 after a legal determination that the child was neglected. Order Terminating Parental Rights of September 1978, App. 5. The child had continuously been in foster care under the custody of DSS since that time. Supra. There can be no question that DSS obtained custody through the exercise of its authority in parens patriae to protect children under N. C. Gen. Stat. §7A-542 et seq. Judge Martin of the North Carolina Court of Appeals characterized this very proceeding as an exercise "of the police power [of] the State to intervene between parent and child..." In the

Matter of Lassiter, 43 N. C. App. 525, 259 S.E.2d 336 at 337 (1979).

When the State, through DSS, acts to protect the child from abuse, neglect or want of essentials of life, the state has properly exercised its parens patriae power to achieve a state goal. After the state has obtained custody of the child, there are few who doubt that the exercise of steps in the child's best interest taken by the state are done in loco parentis. But when the state seeks to terminate parental rights, considerations beyond the child's best interest are raised. Until that point, DSS has clearly acted as its employees believed best for the child - in the same sense as the Georgia DSS sought hospitalization for children in its care.

But the total severance of all relations with the biological or legal parents of a child introduces wider concerns than just the best interest of a child in the narrow sense of food, medication or care. The termination decision

irrevocablely severs the family unit, a relationship which merits the highest constitutional consideration. This constitutionally protected interest in family integrity has not been before the trial court in any of the previous considerations and has not been a motivating concern for DSS in its care of the child. To allow DSS to assert that they are acting only like any other parent in a termination seeking what is proceeding best for the child ignores DSS's statutory duties to "preserve and stabilize family life" and to help persons become more adequate parents. N.C. Gen. Stat. §7A-542. No private litigant under N.C. Gen. Stat. §7A-289.24 has these duties. No private litigant obtains custody and control of a child through the State's resources and pariens patriae authority. Further, Justice Brennan, concurring in part and dissenting in part in Parham v. J.R., supra at 2522 noted that:

> The rule in favor of deference to parental authority is designed to shield parental control of child rearing from State interference. See Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)...
>
> The social worker - child relationship is not deserving of the special protection and

deference accorded to the parent-child relationship and State officials acting in loco parentis can not be equated with parents. See O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972).

The essential, inescapable distinction between the case and the idealized situation presented by the Respondent based on Parham v. J.R. is that DSS would never be in the position to claim that they sought to terminate Petitioner's parental rights by acting in loco parentis (or in any other capacity) had DSS not previously exercised the power of the State in parens patriae to obtain and keep custody and control of the child. Had the State not previously obtained custody of the child under N. C. Gen.Stat. §7A-542 et seq. while acting in parens patriae, under the facts of this case DSS would not be a proper party to initiate a termination proceeding. N. C. Gen. Stat. §7A-289.24.

The question as to what standard of due process is required when the State is not involved in a termination is not before this Court. The intimate involvement of DSS with the

child as a result of a State intrusion into the family and the use of an adversarial judicial proceeding where employees of the State acting in their offical capacities, including an attorney, are the moving parties and primary adverse witnesses establish beyond the question that the State is officially involved in the matter. To accept the contention that DSS is only concerned with the child's best interest is unrealistic. By initiating a petition to terminate parental rights, DSS by implication admits failure in its duties towards the parent and natural family. It is not unreasonable to conclude that the presentation of the case in a manner designed to present the parent in the worst light will legitimate the bureaucratic decision to terminate and disquise a failure of DSS to render effective aid to the parent. As termination proceedings brought by DSS are very often for the purposes of a planned adoption of the child, an interest of DSS which cannot be ignored is the shifting of financial responsibilities for the child from DSS (in the form of payments to foster parents) to the proposed adoptive parents.

Parham v. J.R. reached an appropriate result under the limited facts of that case. But the interests in this case which are similar to Parham stop when DSS files the petition to terminate. Authority in loco parentis exercised by the State ceases when fundmental rights of the family - parent and child - are threatened by State action. The State must act in parens patrie to intrude into the most sensitive of protected interests.

III. APPOINTMENT OF COUNSEL IN TERMINATION OF PARENTAL RIGHTS CASES VINDICATES THE INTEREST THAT ALL PARTIES HAVE IN INSURING THE LEGITIMACY OF THE STATE'S OBLIGATION TO PROTECT ITS CITIZENS

Two themes run through this analysis. One theme has been addressed, supra: that the family is the fundamental unit of our society. This is apparent from the perspective of dry legal analysis of the Fourteenth Amendment and from the strong emotional commitment that most people in this country attach to maintenance of the family unit. This strong commitment to family integrity is also expressed in the negative by suspicions of any destructive State intrusion into the family unit.

The other theme, implicit in the discussion of interests and procedural safeguards, is a fear that has exisited since the founding of this nation of unchecked governmental power. As Justice Black said in Boddie v. Connecticut, 401 U.S. 371 (1971), this is a political system where "...wise men [have] sought to draw a written constitution to protect the people from governmental harassment and oppression, who feared alike the king and king's judges..." 401 U.S. at 393. This Court is aware of the ever increasing power of government over the lives of its citizens, and the resultant distrust and suspicion engendered by this intrusion. The legal system and the Courts have shared in this erosion of confidence.

These themes now merge in the case before the Court: the power of the state is being used to irrevocably sever a family, the fundamental unit of this society. When the power of the state is thus employed, the stage is set for the strengthening of the "fear of the king and king's judges."

As a general proposition, when the state intrudes upon protected interests of its citizens,

it must do so with circumscribed methods. This is true not only because of the constitutional implications of such intrusions, but also because our entire society is based upon the concept of checks upon the governmental power and the rule of law. Though writing in a slightly different context, Justice Harlan stated the principle as follows:

> It is the Courts... That we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through the years of adjudication put flesh upon the due process principle.
> Boddie, supra, 401 U.S. at 375.

Thus in order for the action of the State to be perceived as legitimate, the State must act in a manner perceived as fair and just by its citizens.

This is not only a matter of constitutional analysis, but a matter of the perceptions that enable us to maintain an ordered society.

That the State, acting in good faith and upon the obligations imposed upon it,[2] (whether denoted as parens patriae, or in loco parentis,)

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2. North Carolina's legislative policy with respect to termination of parental rights is expressed as follows: N.C. Gen. Stat. §7A-289.22. Legislative intent; construction of Article.-The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.

(3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.

(4) This Article shall not be used to circumvent the provisions of Chapter 50A, the Uniform Child Custody Jurisdiction Act. (1977, c. 879 1979, c. 110, s. 6)

must continue to intrude upon the familial relationship is unquestioned. That "the state may do much, go very far, indeed, in order to improve the qualty of its citizens, physically, mentally and morally...", Meyer v. State of Nebraska, 262 U.S. 390, 401 (1923), is beyond dispute. The salutory purposes to be served by the termination statute as set forth in N.C. Gen. Stat. §7A-289.22 are worthy goals deserving of continued State activity. But seen in this light, the interests of all parties to the action are ultimately the same -- legitimization of a proper State activity. In order for the purposes set forth in N. C. Gen. Stat. §7A-289.22 to be ultimately vindicated, the procedure by which the State effectuates those purposes must be fair. Where the two themes - the sanctity of the familial relationship and distrust of State institutions (used in the widest sense to encompass the judicial system) converge, the procedures needed to insure fairness become of the utmost importance. These procedures must be fair not only to satisfy due process standards and insure a fair result in a judicial proceeding, but to insure that each time the State intrudes

into the family unit and terminates the parent-child relationship, the public at large perceives the intrusion to be legitimate. As will be discussed infra, the assistance of counsel is an essential element of fairness and the perception of fairness. In this larger sense, appointment of counsel serves the State's interests as well as that of the parent and child.

With this ultimate convergence of interests, the only possible objection the State could have to the appointment of counsel is the fear of increased cost or of interference with the efficiency of the termination process. Even in pursuit of the laudable goals of N. C. Gen. Stat. §7A-289.22 there are restraints on the procedures to be utilized by the State:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may

> characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.
> Stanley v. Illinois, 405 U.S. 645, 656 (1972).

As will be developed further, infra, parental rights cases are complex factually, legally, emotionally and constitutionally. The potential loss to the parent and child is great. But the loss to the society as a whole is even greater if, in a proceeding where there are never winners, the unchecked exercise of State power leads even one citizen to believe that proceeding was unfair. That type of damage may never be undone.

IV. PARENTS UNREPRESENTED BY COUNSEL RISK ERRONEOUS DEPRIVATION OF THEIR PARENTAL RIGHTS BECAUSE OF THE COMPLEXITY OF THE PROCEEDING, AND THE STATE RECOGNIZES THIS COMPLEXITY BY PROVIDING COUNSEL TO ALL PARTIES THROUGHOUT JUVENILE PROCEEDINGS EXCEPT FOR PARENTS AT TERMINATION.

A proceeding to terminate parental rights is complex in terms of both evidentary and substantive law. The parent is faced with "[T]he full panoply of the traditional weapons of the state" Danforth v. State Department of Health & Welfare, 303 A.2d 794, 799 (Me. 1973). The Court in Davis v. Page, 618 F. 2d 374 (5th Cir. 1980), rehear. en

banc granted, succinctley describes the power and arrayed against the parent:

> The state is represented by the state attorney; it has access to public records concerning the family and to the services of social workers, psychiatrists, and psychologists. These representing the state have experience in legal proceedings and the ability to examine witnesses, present evidence, and argue skillfully that the child should be adjudicated dependent. 618 F. 2d at 380.

Faced with this is a parent who is not trained in the substantive and procedural law, and who does not have at his or her fingertips the rules of evidence that would be needed to stem the evidentiary tide of the state. The Court in Davis again states the result:

> Unless the indigent parent has the tools necessary to oppose the state's expert presentation, a finding of dependency could be based partially upon inadmissible hearsay, improper opinion evidence, or evidence irrelevant to the issue of dependency. A determination of dependency might be founded upon testimony that a skilled attorney would expose as biased or untrue. The parent may have a defense sufficient to prevent an adjudication of dependency, which he or she is unable adequately to present. Davis, supra at 381.

These are not imagined concerns. In the case before the Court, a substantial part of the evidence addressed by the State was in the form of social welfare records which were not authenticated as business records exceptions to the hearsay rule. Further, the very statutory framework upon which the state relys to bring this termination action has a built-in bias that a skilled cross-examiner could detect, i.e. the State, acting through its Social Services agencies has already determined that its interests would be best served by terminating parental rights. It is highly unlikely that the State will bring forth evidence that is not supportive of the end which it seeks. This proceeding is not one where the State as a disinterested party comes before the Court in a benign effort to seek the truth wherever it may lead. The State is in fact pursuing an end which it has already determined, and it scarcely can be relied upon to contradict itself. Again, the Davis Court sums up the reality of the proceeding:

> The value of counsel in a dependency proceeding is inestimable. The words of the

Court in Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) explaining the need for counsel in criminal cases, are equally descriptive of the plight of a parent in a dependency proceeding:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the preceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. Davis, supra at 381.

The state itself recognizes the complexity of the termination procedure. Interwoven throughout the juvenile statutory scheme is the mandate by the State that the participants in the process be represented by counsel. There is one place in the scheme where an indigent participant is deprived of counsel. It is at this point where

the ultimate and irrevocable sanction is applied to the family unit - final severance of the parent-child relationship. For the State to say that counsel is necessary at all other steps of its intrusion into the family, and then to maintain that, at the point of the ultimate intrusion, the parent may go unrepresented, defies logic and ignores the admonition of the legislature to protect all children from the unnecessary severence of a relationship with biological or legal parents. N. C. Gen. Stat. §7A-289.22 (2). An examination of these statutes shows the importance the State attaches to participation of counsel.

N. C. Gen. Stat. §7A-586 requires the appointment of an attorney, licensed to practice law in the State of North Carolina, as guardian ad litem for the juvenile where there are allegations of abuse or neglect.[3]

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3. §7A-586. Appointment of guardian ad litem.-When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family

The statute mandates sweeping investigatory powers for the guardian ad litem, in addition to

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and community to meet those needs; to appear on behalf of the juvenile in the court proceeding and to perform necessary and appropriate legal services on his behalf; to present relevant facts to the judge at the adjudicatory hearing and to explore options with the judge at the dispositional hearing; to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge; and to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals.

The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to appear with the juvenile in any criminal action wherein he may be called on to testify in a matter relating to abuse.

The guardian ad litem shall be an attorney-at-law, licensed to practice in the State of North Carolina. In no case may the judge appoint a public defender as guardian ad litem. The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclusure of any information or reports shall be made to anyone except by order of the judge. (1979, c. 815, s. 1.)

admonishing him to render "appropriate legal services on his (the child's) behalf" and "to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals." It is manifest that the State sees the participation of counsel on behalf of the juvenile as essential to a fair and just result.

In cases where there are allegations of abuse, neglect or dependency, N.C. Gen. Stat. §7A-587 mandates the appointment of counsel for indigent parents.[4] It is interesting to note that the statute requires appointment in dependency proceedings although a similar requirement is not made with respect to the guardian ad litem under N.C. Gen. Stat. §7A-586. This indicates the realization by the State that any intrusion into the family unit as parens patriae must be clothed with procedural protections and the further realization that the parent is assumed to be acting in the best interests of the child and

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4. §7A-587. Parent's right to counsel.-In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. (1979, c. 815, s.1.)

thus is accorded, procedurally, protection of counsel in dependency proceedings even where a guardian ad litem is not required for the child.

As has been discussed in detail supra, the distinction that the respondent seeks to make between dependency, neglect and abuse proceedings and termination proceedings is meaningless -- both involve severing the family unit. Thus the recognition by the State of high importance of counsel in the process in dependency, neglect, and abuse proceedings points up the anomaly of not requiring such an appointment in termination proceedings -- the parent's hour of greatest need.

The anomaly of the State's position is further high-lighted when the termination statutes themselves are examined. N.C. Gen. Stat. §7A-298.29 (b) requires the appointment of a licensed attorney as guardian ad litem for the child if there is filed "an answer (denying) any material allegation of the petition, the court shall appoint a licensed attorney as guardian

ad litem for the child..."[5] The fact that a guardian ad litem is appointed only if there is a probability of a truely adversary proceeding again shows the importance that the State attaches to the participation of counsel in the termination proceeding.

And finally, the State itself was represented by counsel in the instant case. Nothing in the record shows that, in fact, the State ever initiates a termination proceeding without the benefit of counsel.

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5. §7A-289.29. Answer of respondents.-(a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney. (b) If an answer denies any material allegations of the petition the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The Child shall conduct a special hearing after notice of not less than 10 days not more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, c. 8.)

V. THE CHARACTERIZATION OF A PROCEEDING AS CIVIL OR CRIMINAL IS NOT DETERMINATIVE OF THE NEED FOR COUNSEL.

This case should not be allowed to turn on the fact that one litigant or the other succeeds in placing the label "criminal" or "civil" on the termination procedure. In determining the parameters of due process this Court has always looked beyond labels to the nature of the interest at stake. In Re Gault 387 U.S. 1,49-50 (1967).

The interest affected by a termination proceedings is analogous to, if not more important than those interests affected in a criminal proceeding:

> Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than lose the companionship and custody of their children. Davis v. Page, 618 F. 2d 374 (5th Cir. 1980)

In the criminal law, the interest protected is personal liberty from confinement. In this

case, the deprivation is the absolute and permanent loss to the parent of custody, control and companionship of the child. While the loss of liberty is frequently temporary, the loss suffered by the parent is irrevocable. In a criminal case, the defendant is afforded the highest protections of the law -- trial by jury, a clear measure of the standard of prohibited conduct and a decision reached beyond a reasonable doubt -- while in this case trial by jury was not allowed, N.C. Gen. Stat. §7A-289.30 (a), the standard of prohibited conduct is unclear,[6] and the decision reached by the court need only be supported by clear, cogent and convincing evidence. N.C. Gen. Stat. §7A-289.30(e).[7] Further, the same facts which would support a termination could lead to criminal prosecutions.[8]

The line of cases that establish the require-

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6. See Appendix B, infra, for complete Statute.

7. See Appendix B, infra, for complete Statute.

8. A review of the grounds for termination reveals parallel criminal sanctions in virtually every instance. See Appendix A, infra, for a comparison of specific section of N.C. Gen. Stat. §7A-289.32 with its counter-

ment for court-appointed counsel in criminal cases[9] shed light upon the public policy considerations which mandate appointed counsel in termination of parental rights cases. As the Court said in Gideon v. Wainwright, 372 U.S. 335 (1963):

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assume fair trails before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him. 372 U. S. at 344.

Those same perceptions of fairness which have compelled the courts to surround the criminal proceeding with the strictest safeguards - including the right to counsel - in order to insure acceptance where fundamental rights are at stake compel that those same procedural safeguards attach to termination of parental rights proceedings.

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part in the criminal statutes.

9. That the right of counsel is fundamental to our judicial system is well established: Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938) and Powell v. Alabama, 287 U.S. 45 (1932).

CONCLUSION

Because of the fundamental nature of the interest in family integrity at issue here, and of the drastic and irrevocable nature of the State's intrusion into that interest, the Amicus Curiae urges that the North Carolina Court of Appeals be reversed, that the case be remanded and that the Petitioner be granted a hearing at which she shall be afforded court-appointed counsel.

Respectfully submitted

NORTH CAROLINA CIVIL LIBERTIES UNION

BY: Douglas A. Scott
Robert S. Payne

APPENDIX A

Grounds for Termination	Criminal Penalty
N. C. Gen. Stat §7A-289.32(2) - abuse or neglect of child by parent.	N. C. Gen. Stat. §14-318.2 - child abuse misdemeanor; statue in addition to other civil or criminal provisions.
	N. C. Gen. Stat. §14-318.4 - child abuse involving serious injury a felony punishable by maximum of 5 year imprisonment; statute in addition to other civil or criminal provisions.
	N. C. Gen. Stat. §14-316.1 - contributing to delinquency or neglect by parents; misdemeanor.
N. C. Gen. Stat §7A-289.32(3) - parents willfully left child in foster care for two years without showing progress in correcting conditions which led to removal of child.	N. C. Gen. Stat. §14-326 mother who willfully abandons minor children; misdemeanor
N. C. Gen. Stat. §7A-289.32(4) - failure to pay reasonable share of cost of care child placed in custody of DSS for six months preceeding	N. C. Gen. Stat. §14-322 - failure to provide adequate support for child; misdemeanor; first offense: maximum of $500 fine or 6

Grounds for Termination	Criminal Penalty
filing of petition	months imprisonment; second offense: fine or maximum of 2 years imprisonment
	N. C. Gen. Stat. §14-322.1 - willful abandonment of children for six months with failure to support and intent to avoid obligation to support; felony.
N. C. Gen. Stat. §7A-289.32(5) - custodial parents seeks to terminate parental rights of non-custodial for failure to support for year preceeding petition.	N. C. Gen. Stat. §14-322; §14-322.1 (as above)
N. C. Gen. Stat. §7A-289.32(6) (d) - natural father of illegitimate child fails to provide support or care for mother and child.	N. C. Gen. Stat. §49-2; failure to putative father to support child, misdemeanor; maximum sentence of 6 months imprisonment.

APPENDIX B

§ 7A-289.30. Adjudicatory hearing on termination. — (a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based on clear, cogent, and convincing evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8; 1979, c. 669, s. 1.)

§ 7A-289.24. Who may petition. — A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or
(2) Any person who has been judicially appointed as the guardian of the person of the child; or
(3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or
(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or
(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

§ 14-318.2. Child abuse a general misdemeanor. — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a). (1965, c. 472, s. 1; 1971, c. 710, s. 6.)

§ 14-326. Abandonment of child by mother.—If any mother shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor. (1931, c. 57, s. 1.)

§ 14-318.4. Child abuse a felony. — (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child,

is guilty of a felony punishable by imprisonment for a period not to exceed five years.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies. (1979, c. 897, s. 1.)

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor. — Any parent who willfully neglects or who refuses to provide adequate support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this Article shall be any person less than 18 years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1; 1977, c. 3, s. 1.)

§ 14-322. Abandonment by husband or parent.—If any husband shall wilfully abandon his wife without providing her with adequate support or if any father or mother shall wilfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted, whether or not he or she abandons said child or children, he or she shall be guilty of a misdemeanor and upon conviction for the first offense shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court; upon conviction of a second or subsequent offense he or she shall be punished by fine or by imprisonment not exceeding two years, or both, in the discretion of the court; and such wilful neglect or refusal shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child shall arrive at the age of eighteen (18) years. (1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; Code, s. 970; Rev., s. 3355; C. S., s. 4447; 1925, c. 290; 1949, c. 810; 1957, c. 369; 1969, c. 1045, s. 1.)

§ 14-316.1. Contributing to delinquency and neglect by parents and others. — Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Human Resources under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Division of Youth Services who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile. (1919, c. 97, s. 19; C. S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5; 1979, c. 692.)

§ 14-322.1. Abandonment of child or children for six months. — Any man or woman who, without just cause or provocation, wilfully abandons his or her child or children for six (6) months and who wilfully fails or refuses to provide adequate means of support for his or her child or children during the six months' period, and who attempts to conceal his or her whereabouts from his or her child or children with the intent of escaping his lawful obligation for the support of said child or children, shall, upon conviction thereof, be guilty of a felony and punished in the discretion of the court. (1963, c. 1227.)